Mr. Parson for Appellee

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 232

JOHN ALDEN LEE, INDIVIDUALLY AND AS TRUSTEE OF LEWIS C. PAINE, APPELLANT,

vs.

LEHIGH VALLEY COAL COMPANY AND KATE P. DIXON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED NOVEMBER 13, 1924

(29,958)

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(29,958)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 222

JOHN ALDEN LEE, INDIVIDUALLY AND AS TRUSTEE OF LEWIS C. PAINE, APPELLANT,

vs.

LEHIGH VALLEY COAL COMPANY AND KATE P. DIXON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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[fol. 1a] **IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK**

In Equity. E. 27, No. 146

JOHN ALDEN LEE, Individually and as Trustee of Lewis C. Paine, Plaintiff,

against

LEHIGH VALLEY COAL COMPANY and KATE P. DIXON, Defendants

PETITION FOR AND ORDER ALLOWING APPEAL

To the Honorable Learned Hand, District Judge:

The above-named plaintiff, John Alden Lee, individually and as trustee of Lewis C. Paine feeling aggrieved by the order and decree rendered and entered in the above entitled cause on the 25th day of October A. D. 1924 does hereby appeal from said order and decree to the Supreme Court of the United States for the reason set forth in the assignment of errors filed herewith and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said order and decree was based, duly authenticated be sent to the Supreme Court of the United States sitting in the Capitol Building in the City of Washington, District of Columbia, under the rules of such Court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required by him be made.

Hector M. Hitchings, Frank T. Wolcott, Attorneys and Solicitors for Plaintiff-Applt.

Appeal allowed upon giving bond as required by law for the sum of $250.

Learned Hand, District Judge.

[fol. 1] IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the plaintiff in the above entitled cause and files the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above entitled cause from the order or decree made by this Honorable Court on the 25th day of October, 1923.

I

That the United States District Court for the Southern District of New York erred in holding that said court was without jurisdiction to hear and determine the cause of action stated in the bill of complaint, for the reason that it appeared upon the fact of said bill that there was not the required diversity of citizenship to confer jurisdiction, Kate P. Dixon being an indispensible and necessary party to the action, her rights and interests being identical with those of the plaintiff and, in consequence, being a citizen and resident of the State of Pennsylvania, the court being compelled to consider and align her as party plaintiff, and her transference to and as a defendant for the reason stated in the complaint being insufficient to vest the court with jurisdiction as a matter of law.

[fol. 2] Wherefore the appellant prays that said order and decree be reversed and that the District Court of the United States for the Southern District of New York be ordered to enter an order or decree reversing the decision of the lower courts in said cause.

Hector M. Hitchings, Frank T. Wolcott, Attorneys for Appellants.

[fol. 3] In District Court of the United States

[Title omitted]

Citation—In usual form; omitted in printing

[fol. 4] District Court of the United States of America

Bond for Damages and Costs for $250.00—Approved and filed Nov. 2, 1923

[fol. 5] In United States District Court

[Title omitted]

Order Allowing Motion to Dismiss Bill of Complaint—Filed Oct. 25, 1923

A motion having been made by the defendant, The Lehigh Valley Coal Company, appearing specially for that purpose, to dismiss the bill of complaint filed in the office of the Clerk of this Court on the 3d day of October, 1923, upon the ground of lack of jurisdiction in the United States District Court for the Southern District of New York to hear and determine said action, and having been entertained upon said ground;

Now, upon reading and filing the affidavit of Campbell Locke, verified October 18, 1923, the two orders made in a prior action, wherein the same plaintiff and the same defendants were named as parties, bearing date the 21st and 27th days of September, 1923, respectively, and the bill of complaint dated June 8, 1923, in said prior action referred to in said orders, the order to show cause granted by the Honorable Learned Hand, U. S. District Judge, and dated October 18, 1923, the aforesaid bill of complaint in this action, filed herein on the 3d day of October, 1923, and upon hearing Peter C. Mann, of counsel for the Lehigh Valley Coal Company, defendant, in favor of said motion, and upon reading and filing the affidavit of [fol. 6] Hector M. Hitchings, verified the 23d of of October, 1923, together with a copy of the opinion of Judge Manton, bearing date September 12, 1923, and the aforesaid order of Judge Manton, bearing date September 21, 1923, both of which were attached to said affidavit, and upon hearing Hector M. Hitchings, of counsel for the plaintiff in opposition to said motion, it is, after due consideration,

Ordered, adjudged and decreed, that the motion to dismiss be and the same is granted and that the District Court of the United States for the Southern District of New York is without jurisdiction to hear and determine this action on the ground of diversity of citizenship of the parties by reason of the fact that the defendant, Kate P. Dixon, a citizen and resident of Pennsylvania, is an indispensable and necessary party to this action and is so united in interest with the plaintiff herein that she must be aligned as a party plaintiff, and that the grounds alleged in the bill of complaint for making her a party defendant are not sufficient to vest this court with jurisdiction of the parties and causes of action.

L. Hand, U. S. District Judge.

[File endorsement omitted.]

[fol. 7] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE

Upon reading the annexed affidavit of Campbell Locke, verified the 18th day of October, 1923, and upon the complaint and subpœna herein, and upon the orders of this Court, dated the 21st and 27th days of September, 1923, in an action attempted to be brought in this Court wherein the same party was named as plaintiff and the same parties were named as defendants, which orders set aside the service of the subpœna in said action and dismissed the bill of complaint therein because of the lack of jurisdiction of this Court and denied plaintiff's motion for a reargument of the said motion to set aside the service of the subpœna and dismiss the bill of complaint,

and upon motion of Alexander & Green, appearing specially herein, as solicitors for the defendant, The Lehigh Valley Coal Company, for the sole and single purpose of this motion, it is hereby

Ordered, that the above named plaintiff, John Alden Lee, individually and as trustee of Lewis C. Paint, or his solicitors herein, show cause before this Court at a Term thereof for the hearing of motions, appointed to be held at the United States Court House and Post-Office Building, in the Borough of Manhattan, City of New York, on the 23rd day of October, 1923, at the opening of Court on that day, or as soon thereafter as counsel can be heard, why the said subpœna, and the attempted service thereof upon he defendant, The Lehigh Valley Coal Company, made by delivering the said sub-
[fol. 8] pœna together with a copy of the bill of complaint herein, upon F. H. Silvernail, on October 5, 1923, should not be vacated and set aside and be declared null, void and ineffective, and why said bill of complaint should not be dismissed on the ground that as appears from said bill of complaint this Court is without jurisdiction in this action, and why the said defendant should not have such other or further order or relief as to the Court may seem just and proper.

And sufficient reason appearing therefor, it is

Further ordered, that the time of the said defendant, The Lehigh Valley Coal Company, within which it may enter a *a* general appearance in the above entitled action, and answer the complaint herein, or make such motion herein as it may be advised, be and the same hereby is extended until ten days after the entry of the order upon the hearing and determination of the said application to be made on this order to show cause as aforesaid.

And sufficient reason appearing therefor, it is

Further ordered, that service of this order and of the affidavit upon which the same is granted may be made by serving a copy of the same upon the solicitors for the plaintiff on or before the 19th day of October, 1923 and the same shall be deemed sufficient service thereof.

Dated, New York, October 18, 1923.

L. Hand, U. S. District Judge.

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF CAMPBELL LOCKE

Campbell Locke, being duly sworn, deposes and says:

That he is an attorney and counsellor-at-law duly admitted to practice in the courts of record of the State of New York and in the United States District Court for the Southern District of New York,

and is a member of the firm of Alexander & Green, attorneys and counsellors-at-law, appearing herein for the defendant, The Lehigh Valley Coal Company, specially for the sole and single purpose of this application to set aside and declare null, void and ineffective the service of the subpœna herein upon the said defendant, The Lehigh Valley Coal Company, and to dismiss this action upon the ground that the Court is without jurisdiction.

That on October 5, 1923, as deponent is informed and verily believes, copies of papers purporting to be a subpœna and bill of complaint in the above entitled action were handed at the office of the said The Lehigh Valley Coal Company at No. 143 Liberty Street, Borough of Manhattan, City of New York, State of New York, to F. H. Silvernail, the secretary of the said The Lehigh Valley Coal Company. That no service of process other than above set forth has [fol. 10] been made or attempted upon the said defendant, as deponent is informed and verily believes.

That The Lehigh Valley Company is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and of no other State; that as is stated in the bill of complaint the plaintiff is a citizen and resident of the State of New York and the Southern District of New York, and the defendant, Kate P. Dixon, is a citizen and resident of the State of Pennsylvania.

That as appears from the bill of complaint this suit is brought to construe a lease of real property of a one-half interest in which the plaintiff is the owner, and of the other half interest in which the defendant, Kate P. Dixon, is the owner, which lease was made between the predecessors in interest of the said plaintiff and the said Kate P. Dixon on the one hand, and The Lehigh Valley Coal Company on the other hand, and for an accounting under the terms of said lease.

That the said defendant, The Lehigh Valley Coal Company, has not appeared generally in this action and does not now so appear, but appears specially for the sole and single purpose of applying to this Court for an order setting aside the subpœna and service thereof made as aforesaid upon and as to said defendant and dismissing said action on the ground that as appears from the face of the complaint this Court has not jurisdiction over the cause of action set forth in the complaint and over this defendant in said action.

That from the statement of the case made to deponent by the officers and agents of the said defendant, The Lehigh Valley Coal Company, the said defendant has a good substantial defense upon the merits to the alleged cause of action set forth in the complaint herein, or to some part thereof, as deponent verily believes.

That twenty days from the attempted service of the subpœna herein, together with a copy of the complaint, upon this defend- [fol. 11] ant as aforesaid, will expire on the 25th day of October, 1923, and in order that this application to set aside and declare null, void and ineffective the said attempted service and to dismiss

this action may be heard and determined before said time expires, and in order that the defendant may not be in danger of being in default for appearance or pleading, pending the determination of said motion, an order to show cause and an extension of the time of the defendant corporation to appear generally herein and to serve an answer or other pleading or to make such motion as may be necessary until ten days after the entry and service of the order to be made and entered upon the hearing and determination of this application are requested.

That no extension or extensions of time to appear in this action, or to answer or mode to the complaint herein, have been granted to said defendant by stipulation or order.

That prior to the service of the subpœna and bill of complaint in this action and on or about the 20th day of August, 1923, there was served upon F. H. Silvernail, the secretary of The Lehigh Valley Coal Company, a subpœna in equity sued out of this Court, wherein the same plaintiff and the same defendant were named as parties, and to which was attached a bill of complaint in substantially the same form as the bill of complaint in this action, the only difference being that certain amendments or additions have been made in the "Third," "Eleventh" and "Fourteenth" paragraphs of the bill of complaint and in the fifth prayer for relief in the complaint. That a motion was made by the defendant, The Lehigh Valley Coal Company, to set aside the service of said subpœna and to dismiss the complaint upon the ground that it appeared from the face of the complaint that this Court did not have jurisdiction, which motion was heard before the Honorable Martin T. Manton, United States Judge, and was granted by order dated the 21st day of September, 1923.

[fol. 12] That thereafter a motion was made for a reargument and for an order denying said motion on behalf of the plaintiff, which said motion was thereafter denied by the Court, Honorable Martin T. Manton, United States Judge presiding, by an order dated September 27, 1923.

That no previous application has been made for the annexed order to this Court, or to any other court or judge thereof.

Campbell Locke.

Sworn to before me this 18th day of October, 1923. R. Damm, Notary Public, Kings County. Certificate filed in New York County No. 146. (Seal.)

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT

An order having been made on the 5th day of September, 1923, by the Honorable Martin T. Manton, United States Circuit Judge

holding this Court, directing the plaintiff or his solicitors herein to show cause why the subpœna herein and the attempted service thereof upon the defendant, The Lehigh Valley Coal Company, made by delivering the said subpœna together with a copy of the bill of complaint herein to F. H. Silvernail on August 20, 1923, should not be vacated, set aside and be declared null, void and ineffective, and why said bill of complaint should not be dismissed on the ground that as appears from said bill of complaint this Court is without jurisdiction in this action, and the said motion having duly come on to be heard and the Court having heard Peter C. Mann, of counsel for the defendant, The Lehigh Valley Coal Company, appearing specially for the purpose of said motion, in support of said motion, and Hector M. Hitchings of counsel for the plaintiff in opposition thereto, and due deliberation having been had;

[fol. 14] Now, upon reading the subpœna dated the 17th day of August , 1923, and the bill of complaint dated the 8th day of June, 1923, the said order to show cause dated the 5th day of September, 1923, and the affidavit of William W. Green, verified the 5th day of September, 1923, thereto annexed, and upon motion of Alexander & Green, appearing specially herein as attorneys for the defendant, The Lehigh Valley Coal Company, for the sole and single purpose of this motion; it is hereby

Ordered, that the said motion be and the same hereby is granted; and it is further

Ordered, that the said subpœna dated the 17th day of August, 1923, and the attempted service thereof upon the defendant, The Lehigh Valley Coal Company, made by delivering said subpœna together with a copy of the bill of complaint herein upon F. H. Silvernail on August 20, 1923, be and the same hereby is vacated, and set aside and declared null, void and ineffective, and that said bill of complaint be and the same hereby is dismissed, and the Clerk of this Court is hereby directed to enter judgment accordingly.

Enter:

Manton, U. S. J.

[fol. 15] [Title omitted]

ORDER OVERRULING MOTION FOR REARGUMENT

A motion having been made on behalf of the defendant, The Lehigh Valley Coal Company, for an order vacating, setting aside and declaring null, void and ineffective the subpœna herein and the attempted service thereof and dismissing the bill of complaint herein on the ground that the Court is without jurisdiction in this action, as appears from said bill of complaint, and the said motion having been granted, and an order having been made by the Honorable Martin T. Manton, United States Circuit Judge holding this Court, directing the defendant, The Lehigh Valley Coal Company, or its

attorneys, to show cause why a reargument of said motion should not be had, and why said motion should not be denied with costs, and the said motion having been duly submitted by Hector M. Hitchings, solicitor for the complainant, and the Court having heard Peter C. Mann of counsel for the defendant, The Lehigh Valley Coal Company, appearing specially for the purpose of said motion, in opposition thereto, and due deliberation having been had;

[fol. 16] Now, upon reading the said order to show cause dated the 19th day of September, 1923, and the affidavit of Hector M. Hitchings, verified the 19th day of September, 1923, thereto annexed, the subpœna dated the 17th day of August, 1923, and the bill of complaint dated the 8th day of June, 1923, the order to show cause dated the 5th day of September, 1923, and the affidavit of William W. Green, verified the 5th day of September, 1923, thereto annexed, and upon motion of Alexander & Green, appearing specially herein as attorneys for the defendant, The Lehigh Valley Coal Company, for the sole and single purpose of moving to set aside the subpœna and the attempted service thereof and to dismiss the bill of complaint herein; it is hereby

Ordered, that the said motion for a reargument be and the same hereby is denied.

Manton, U. S. J.

[fol. 17] IN UNITED STATES DISTRICT COURT

SUMMONS AND SHERIFF'S RETURN

I hereby certify, that on the 5 day of October, 1923, at the City of New York, in my district, I served the within subpœna in equity upon the within named defendant, The Lehigh Valley Coal Company, by exhibiting to F. H. Silvernail, as Treasurer of said Company, at No. 143 Liberty Street, New York City, the within original, and at the same time leaving with him a copy thereof, and at the same time and place left with him a copy of Bill of Complaint in this Court.

Dated October 8, 1923.

William C. Hecht, United States Marshal, Southern District of New York.

[fol. 18] The President of the United States of America to The Lehigh Valley Coal Company and Kate P. Dixon, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of

complaint exhibited against you in the said Court in a suit in Equity, by John Alden Lee, individually and as trustee of Lewis C. Paine, and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you of Two Hundred and Fifty Dollars ($250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 3rd day of October in the year One Thousand Nine Hundred and Twenty-three, and of the Independence of the United States the One Hundred and Forty-eighth.

Alex. Gilchrist, Jr., Clerk. Hector M. Hitchings, & Frank T. Walcott, Sol'rs.

The defendants are required to file their answer or other defense in the above cause in the Clerk's office on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken Pro Confesso.

Alex. Gilchrist, Jr., Clerk. (Seal.)

[fol. 19] In the District Court of the United States

[Title omitted]

Complaint

Plaintiff complains of defendants and shows to this Court:

First. Plaintiff is a citizen of the United States and a citizen and resident of the City, County and State of New York and is within the jurisdiction of this Honorable Court.

Second. Defendant, The Lehigh Valley Coal Company is a foreign corporation organized and existing under the laws of the State of Pennsylvania, and is a citizen of the United States and of the State of Pennsylvania, but that it has complied with Sections 15 and 16 of the General Corporations Law of the State of New York and has long since obtained from the Secretary of State of New York, a certificate entitling it to do business in the State of New York and is now and for years past has had a place of business and has been engaged in conducting and carrying on business in the City, County and State of New York.

Third. That the defendant, Kate P. Dixon is a citizen of the United States and of the State of Pennsylvania and resides at 75 North River Street, City of Wilkes-Barre, in the State of Pennsylvania, and is a proper party plaintiff to this action but has been made a party defendant because of her expressed unwillingness and refusal to be made a party plaintiff, and because to make her such party plaintiff would oust the court of jurisdiction.

Fourth. The grounds upon which the Court's jurisdiction depends is that the amount involved in this cause is over $3,000, exclusive of interest and costs and there is diversity of citizenship between plaintiff and all the defendants.

Fifth. On the 7th day of November A. D. Eighteen hundred and eighty-one, by a deed in due and proper form dated on that day, duly and properly executed and delivered and thereafter and on the 24th day of January, 1882, duly recorded in the office of the Recorder of Deeds of Luzerne County, Pennsylvania, in deed book 228 at page 184, etc., one Maggie A. Lee and J. Frank Lee of the City of Wilkes-Barre and State of Pennsylvania, being the fee owner and in full possession thereof, duly made, constituted and appointed George R. Bedford and John Wroth, Jr., of the same place, trustees of said Maggie A. Lee; deeded to them and their survivors or substitutes her share of the real property set out and more fully described in the lease thereof, copy of which is hereto annexed as Exhibit I, said share or interest being the fee of an undivided one-half of said property with all the coal underlying the surface thereof. That said deed of trust further provided that the net income of said [fol. 20] trust estate should be paid to said Maggie A. Lee during her life and at her death, if all her children were then of the age of twenty-one years and there were no children of any deceased child, that the estate so devised in trust should vest in her then living children.

Sixth. Subsequently to the execution and delivery of the deed of trust stated in the fifth paragraph and on the twenty-second day of October, one thousand eight hundred and ninety, said Maggie A. Lee, having become discovert and having married William L. Paine, duly made, executed and delivered with said William L. Paine, her husband a second deed of trust bearing date October twenty-second, one thousand eight hundred and ninety and, on the 25th day of October, 1890, caused same to be duly recorded in the office of the Recorder of Deeds of Luzerne County, Pennsylvania, in deed book, number 295 at page 385. That said deed confirmed the aforesaid deed of trust to said John R. Bedford as survivor, said John Wroth, Jr., having died between the date of the original deed of trust and said second deed. The other provisions in said last named deed are without relevancy to the issues here presented.

Seventh. On December 15th, 1888, the lands and premises with all the coal underlying the surface thereof, specified and described in the least thereof next hereinafter described were owned in fee simple absolute by Caroline M. Pettibone, as to an equal, undivided one-half part thereof and by said George R. Bedford as trustee as aforesaid, as to the other equal undivided one-half part thereof, as tenants in common, and not as joint tenants.

Eighth. On the 15th day of December A. D. 1888, said Caroline M. Pettibone and said George R. Bedford, as trustee, with the written consent and approval of said Maggie S. Paine, formerly Maggie A.

Lee, affixed thereto, duly made, executed and delivered to the defendant, Lehigh Valley Coal Company, the original lease, copy whereof is hereto attached as Complainant's Exhibit 1 and to which lease plaintiff hereby refers as a part of this allegation of the complaint.

Ninth. That pursuant to the terms and provisions of said lease, Exhibit I, the defendant, Lehigh Valley Coal Company, at once entered into full and complete possession of said leased premises to the exclusion of any and all other person or persons, corporation or corporations, and have ever since remained and are today in such full, complete and exclusive possession of said premises and have been and now are engaged in mining and removing merchantable coal from said premises, and in marketing and selling the same and collecting the full sales price thereof, and, in making additional use of said premises for transit, tramway and transportation purposes, of coal mined not alone from the said leased premises but from other premises lying more distant from the mine entrance and beyond the said premises so as aforesaid leased to them by said Caroline M. Pettibone and said John R. Bedford, as trustee.

Tenth. That since the date of said lease, to wit, December 15, 1888, there have been a number of successor trustees to said John R. Bedford, each duly appointed by the Court of Common Pleas of Luzerne County, Pennsylvania, or by the Supreme Court of the State of New York in the County of New York, to which state and county Maggie S. Paine subsequently removed and in which state and county she duly resided up to the time of her death as hereinafter stated, the last of said trustees prior to this plaintiff being Hector M. Hitchings of the City, County and State of New York.

Eleventh. On information and belief that heretofore and before the termination of the trust above stated, Caroline M. Pettibone died in Luzerne County, Pennsylvania, and the defendant, Kate P. Dixon, succeeded to and became vested and now is vested, in fee, with all the interest of said Caroline M. Pettibone in said leased premises, [fol. 21] that is to say of, in and to an undivided one-half interest therein and to an equal, undivided one-half interest, as a tenant in common with this plaintiff in the lease rental described in paragraph Eight of this complaint and in Exhibit 1, hereto attached.

Twelfth. On May 31, 1917, said Maggie S. Paine died in the City, County and State of New York, leaving her surviving as her sons and sole heirs at law and next of kin, John Alden Lee, William S. Paine and Lewis C. Paine, all of full age, and leaving no other children and no children of any deceased child.

Thirteenth. Prior to her death said Maggie S. Paine had purchased all the remainder, right, title and interest of her said son, William S. Paine of, in and to the aforesaid property in Luzerne County, Pennsylvania, leased as aforesaid to said Lehigh Valley Coal Company and had received from him a due and proper deed of con-

veyance and assignment in writing, properly executed, of all his said remainder, right, title and interest.

Fourteenth. By her last will and testament dated and published January 25, 1917, and duly admitted to probate by the Surrogates' Court of New York County on the 28th day of June, 1917, said Maggie S. Paine devised and bequeathed to her two sons. John Alden Lee and Lewis C. Paine, all the property and all the interest in the trust estate which she had so as aforesaid purchased and received by deed and assignment from her said son, William S. Paine, and thereupon and thereafter said John Alden Lee, this plaintiff, and said Lewis C. Paine became, were and now are vested in fee simple absolute with the undivided one-half part of said premises, so as aforesaid leased, to the defendant Lehigh Valley Coal Company, and of the lease rentals thereof under said lease each being entitled to a one-quarter part or interest therein.

Fifteenth. On October 7, 1913, in a special proceeding duly instituted in the New York Supreme Court, New York County, upon the petition of said Maggie S. Paine and of all her then living children, remainder-men, Hector M. Hitchings, of the City of New York, was, by an order of said Court, duly appointed substituted trustee under the aforesaid trust originated by the aforesaid deed of trust by J. Frank Lee and Maggie A. Lee to George R. Bedford, his immediate predecessor in the trust, being the Guardian Trust Company of the City of New York, said trust company having duly accounted and having consented to such appointment and substitution and having been discharged as such trustee and immediately thereafter said Hector M. Hitchings duly accepted said trust and at once entered upon the duties thereof:

Sixteenth. During the year 1905, the defendant, Lehigh Valley Coal Company, knowingly in direct violation and disregard of the specific terms of the aforesaid lease (Exhibit 1 attached), wilfully and unlawfully ceased, neglected and refused to pay to said The Guardian Trust Company, the then trustee of said Maggie S. Paine under said deed of trust, as well as to said defendant Kate P. Dixon, a dollar of the rent or royalty reserved, provided and agreed to be paid to the lessors under clauses 2 and 3 of said lease agreement, and continued such wilful and unlawful neglect, failure and refusal to pay, down to the 31st day of January, 1913, basing its said neglect, failure and refusal upon the knowingly false and fraudulent and illegal claim and assertion that, under the terms of said lease agreement, said lessee had then paid, in minimum royalties, in full for all the unmined coal remaining in said leased premises and that it had not only a legal and lawful right to retain full and exclusive possession of said premises and to mine out all the balance of said mineable and merchantable coal, then unmined, without the payment of a dollar of rental or royalty value therefor, but that it also had a full and complete right of exclusive possession of said demised premises for any or all other use or uses to which it might subject the same for the balance of the original term of said lease of 999 years.

[fol. 22] Seventeenth. That at the time of such original neglect and refusal, to wit, in the year 1905, and at several times subsequent thereto, by repeated decisions of the highest judicial court of Pennsylvania, the law of Pennsylvania had become thoroughly established and settled against the contention and claim of defendant as set out in the last paragraph and that said law and decisions were well known both to the defendant and to said The Guardian Trust Company, the then trustee of the estate of Maggie S. Paine, but that, nevertheless, the Guardian Trust Company being without any trust funds on hand to bring or maintain a proper action or proceeding in the courts to recover said rental and establish its rights to the same, failed, neglected and refused to bring and maintain any proper action or proceeding to establish its said right and collect said rents and royalties from the year 1905 to March 7, 1911, and that, under these conditions and on or about the 7th day of March, 1911, said Maggie S. Lee, the beneficiary and cestui que trust of one-half of said property and said Marjorie Lee, John Alden Lee, William S. Paine and Lewis C. Paine, the sole remaindermen under said deed of trust of November 7, 1881, for the purpose of having said rents and royalties collected and preventing the Statutes of Limitations and the defence of laches running against the same, signed, executed and delivered to one, George W. Glaze, a lawyer of the City and County of New York, the power of attorney, copy of which is hereto annexed and hereby referred to and made part of this complaint as Exhibit 2.

Eighteenth. That on said first day of January, 1913, a full and correct statement of rentals accrued and payable, minimum and otherwise and of the coal mined by defendant and of the royalties payable thereon and of the rents actually accrued was made up by the defendant from its books and will be found attached hereto and is hereby referred to as a part hereof as Exhibit 3.

Nineteenth. Thereafter such proceedings were had and taken between said George W. Glaze as such attorney in fact and by the defendant, Lehigh Valley Company, that an agreement in writing was executed between them bearing date the 21st day of January, 1913, a copy whereof is hereto attached as Exhibit 4, and is hereby referred to as a part hereof and that pursuant to the terms of said agreement there was paid and delivered by the defendant to said George W. Glaze as such attorney a sum equal to fifty per cent of one-half of the minimum rental due since March, 1905, with interest thereon in full of their share of minimum rental up to the date of said agreement.

Twentieth. That shortly after the execution and exchange of said agreement between said George W. Glaze and defendant, The Lehigh Valley Coal Company, Hector M. Hitchings having been appointed by the Supreme Court of New York substituted trustee of the estate of said Maggie S. Paine in the place and stead of said Guardian Trust Company of New York, as set out in the Fifteenth paragraph hereof, he did on the 13th day of January, 1914, duly bring and prosecute a common law action in the Supreme Court of New York, New York

County, against the defendant, Lehigh Valley Coal Company, to recover the other 50% of rents earned, due and owing under the terms and provisions of said lease agreement and to have said agreement of settlement held good only for the amount actually paid pursuant thereto. That plaintiff refers to the pleadings in said action, copy whereof is hereto attached as Exhibit 5 and makes same a part hereof.

Twenty-first. That said action in the New York Supreme Court came on for trial before the Hon. William P. Burr, Justice, and a jury, on the first day of November, 1920, and was tried before him and that, at the end of said trial, said Justice held that said agreement of settlement, Exhibit 4, hereto annexed, was in law, the settle-[fol. 23] ment of a disputed claim and said settlement constituted an accord and satisfaction of the sums due and owing on said January 21, 1913, and he declined and refused to submit the question as a question of fact to the jury and directed a verdict for the defendant, dismissing the complaint; that an appeal was subsequently taken from the judgment entered on such direction, and that said appeal was subsequently heard by the Appellate Division of the Supreme Court, First Department, and said judgment was by said Appellate Court, subsequently affirmed.

Twenty-second. On March 29, 1921, said Hector M. Hitchings, duly accounted for all his acts and proceedings as trustee to the remaindermen of said trust estate and by a written agreement of that date was duly released and discharged from all the duties and obligations of said trust, and that he at the time turned over the entire trust estate to said remaindermen, John Alden Lee and Lewis C. Paine, and by the same instrument and agreement, the plaintiff herein, John Alden Lee, was duly appointed trustee for himself and his said brother, Lewis C. Paine of the said trust estate. A copy of said agreement is attached hereto as Exhibit 6 and is hereby referred to as a part hereof:

Twenty-third. That in the 24 years between December 15, 1888, and January 21, 1913, during which time defendant was in full and exclusive control and possession of said leased premises, defendant only mined and removed from said leased premises and sold and accounted for approximately 127,635.18 tons of mineable coal, leaving on said January 21, 1913, unmined and unremoved from said premises, approximately 145,170.11 tons of good, mineable, merchantable coal capable of being mined and removed with ordinary processes and means of mining then in use, and that in addition thereto there were two veins of coal of unexplored size, depth, quality and value so far as this plaintiff is informed and can state but which he believes to be of great value. That said facts appear more fully in the report of the two arbitrators copy whereof is hereto attached and hereby referred to as Exhibit 7 as a part hereof and in the next paragraph set out.

Twenty-fourth. That under the agreement of January 21, 1913, John M. Humphreys and James H. Hughes were appointed arbitra-

tors to determine the quantity and amount of merchantable, mineable coal remaining in said leased premises unmined and unremoved and that they subsequently and on or about September 9, 1913, made their report in writing, finding the amount of unmined, merchantable coal as hereinabove and in the "twenty-third" paragraph hereof stated, but that said report is, as plaintiff is informed and believes, wholly without legal force or effect as to their legal deductions therein contained and said submission and report as plaintiff is informed and believes, became a mere condition precedent to the bringing and maintenance of the present action, the said arbitration having never been made a rule of the Court of Common Pleas of Luzerne County as plaintiff is informed and believes and same was informatory only for the court as determining the quantity and quality of the unmined coal in said leased premises.

Twenty-fifth. On information and belief that the decision of Judge Burr related and must be held confined to the first part of said agreement of January 21, 1913, and that as to the second part of said agreement, commencing with paragraph 12 thereof the same was wholly unauthorized by the power of attorney to said Glaze; was wholly without consideration of any kind moving to said Glaze, as attorney in fact, or to said Maggie S. Paine as life tenant, or to the plaintiff or to any of the remaindermen under said trust, and that same was and is without binding force or effect upon the trust estate of the remaindermen subsequently succeeding to the title to such trust estate; that the same is wholly inconsistent with the preceding parts of said agreemnt and is nullified thereby; that defendant [fol. 24] has completely breached the covenants and conditions of said agreement of January 21, 1913, in that it did not mine out all the unmined coal within a period of three years from its date and did not pay for the same in said three months threafter or for any part of the same, as in said agreement provided, and that it has not, up to the present time, as plaintiff is informed and believes, mined out all such coal, although it has been continuously and uninterruptedly in possession of and occupying said leased premises since January 21, 1913, to the complete exclusion of any and every other person or corporation therefrom; that defendant has been constantly using said leased premises for ingress and egress and transportation purposes to and from other properties beyond the premises covered by the lease of this plaintiff and of said Kate Dixon and that said use has been in the past and will continue to be in the future of great value to said defendant; that defendant has been actually mining, removing, selling and collecting the proceeds of sale of mineable and merchantable coal from said leased premises since January 21, 1913, together with great quantities of culm or material formerly regarded as refuse, without accounting or paying one dollar for the same; that the per ton royalties on merchantable, mineable coal so as aforesaid removed by defendant under Clause 2 of the lease, as plaintiff is informed and believes, is in excess of $35,000 while the minimum royalties, pursuant to Clause 3 of the lease, from January 21, 1913, to the present time aggregates more than $40,000 and that

no part of either of said sums has been paid; that plaintiff is informed and believes that the two unexplored veins underlying those worked by the plaintiff prior to January 21, 1913, have become mineable and merchantable by methods now in common use and that same are of great value, but that defendant has purposely refrained from exploiting and mining out said veins because it has under lease large amounts of coal lands and properties adjacent to the property of plaintiff, easily reached through the workings on plaintiff's property, and that the working of these is easier, less costly and more profitable than the working of the aforesaid lower levels or veins; that owing to the great increase in the market value of coal at the mines, the exploitation of said lower veins is now not only possible at a reasonable cost and expense, but constitutes a very valuable asset for this defendant, and under the terms of said lease keeps and maintains all the terms and conditions of said lease in full force and effect, as plaintiff is informed and believes.

Twenty-sixth. That before the commencement of this action plaintiff demanded of the defendant, Kate P. Dixon, that she become a party plaintiff to this action and that she declined and refused so to do and she is, in consequence, made a party defendant hereto.

Twenty-seventh. That plaintiff has no adequate remedy at law for the necessary relief to which he is entitled under the circumstances stated in this complaint.

Twenty-eighth. That plaintiff has been unavoidably delayed in the commencement of this action by the pendency of the prior action brought in the State Supreme Court as hereinabove set out, and that the present action was brought as soon as possible after the termination of said former action.

Wherefore, plaintiff demands judgment:

1. That the true meaning and effect of agreement of lease attached hereto as Exhibit 1 may be judicially determined in accordance with the settled law of the State of Pennsylvania.

2. That the true force and effect of the agreement of January 21, 1913, may be judicially determined.

3. That it be judicially determined that the second part of said [fol. 25] agreement of January 21, 1913, from the 10th clause to the end thereof is wholly without consideration, a fraud upon plaintiff and Kate Dixon, illegal, unlawful and void.

4. That defendant be compelled to account to this plaintiff and to the said Kate Dixon pursuant to the terms and requirements of the lease agreement attached hereto as Exhibit 1 for each and every ton of coal mined and sold by it since the 23rd day of January, 1913, or, in the alternative for the minimum rental royalties since said date, and pay over to this plaintiff one-half of the amount found due thereon.

5. That the aforesaid lease, copy of which is attached, be declared to be in full force and effect as to all its terms and provisions, and to have been in full and continuous force since January 21, 1913.

6. That plaintiff may have the costs of this action.

7. That plaintiff may have such other and further relief in the premises as to the court shall seem just and proper.

Dated at New York, October 1st, 1923.

Hector M. Hitchings, Frank T. Wolcott, Solicitors for Plaintiff.

EXHIBIT 1 TO COMPLAINT

Copy of Coal Lease

This Indenture made and concluded the 15th day of December, A. D., 1888, between Caroline M. Pettebone of Wyoming, Luzerne County, Pennsylvania and George R. Bedford of the City of Wilkesbarre, said County and State, Trustee for Maggie S. Paine (formerly Maggie A. Lee), by virtue of a deed of trust recorded in Luzerne County in Deed Book No. 228, page 185, etc., the assent of the said Maggie S. Paine to the execution of this indenture being evidenced, as required in said deed by her signature to the same, as a subscribed witness, parties of the first part, and the Lehigh Valley Coal Company, a Corporation duly incorporated under the laws of Pennsylvania, party of the second part; Witnesseth:

Whereas, the parties of the first part are seized in fee of all the coal in, under and upon all that piece or parcel of land situate in Wyoming Borough, said County and State, bounded and described as follows, to wit:

Beginning at a point in the center of the certified road through Kingston Township, opposite the line between certified lots numbers seven (7) and eight (8), in the second division of lots in said Township; thence by said line South Forty-five (45) degrees East Twenty-five Hundred and Twelve (2,512) feet to the Susquehanna River at low water mark; thence North Forty-six (46) degrees and Forty-five (45) minutes East Seven Hundred Fifty-six and Eight-tenths (756.8) feet to a corner; thence North Forty-five (45) degrees West Thirteen Hundred and Forty-six and Three-tenths (1,346.3) feet; thence South Forty-five (45) degrees West Three Hundred Eighty-five and Sixty-four hundredths (385.64) feet to a corner; thence North Forty-five (45) degrees West Nine Hundred Sixty-one (961) feet to the center of the aforesaid road; thence South Seventy-six (76) degrees and Thirty (30) minutes West Four Hundred Thirty-four and Seven-tenths (434.7) feet to the place of beginning. Containing Thirty-three acres.

[fol. 26] Now, Therefore, this indenture Witnesseth; That the parties of the first part, for and in consideration of the covenants and agreements hereinafter contained, to be kept and performed by the party of the second part, have demised, leased and to mine let, and by these presents do demise, lease and to mine let unto the said party of the second part, its successors and assigns, for and during and until the full end and term of Nine Hundred and Ninety-nine (999) years from the date of these presents, all the merchantable anthracite coal, in, under and upon the said above described land, which is accessible and mineable by the ordinary processes of mining. Together with the sole and exclusive right to mine, remove and dispose of the same for the sole use and benefit of the party of the second part, the lessee, upon the term- and conditions, and subject to the payments of the royalties named and provided for herein, to wit:

1. The party of the second part, the lessee, shall have the right to use only so much of the surface of the said land as shall be necessary for an air shaft or air shafts, provided the area so required shall not in any event exceed three (3) acres. The party of the second part shall pay for the surface required for the purpose above indicated, the price which shall be determined by three appraisers, one of whom shall be chosen by each of the parties, and the third shall be selected by the appraisers so chosen by the parties; the party of the second part, the lessee, shall have the right to enter upon the surface of this land for the purpose of testing the coal by one or more bore holes, care being taken, at the same time to do as little damage as possible to the surface.

2. The party of the second part, the lessee, has to account and pay for all said coal to be mined and taken away, as above stated, in lawful money, the sum of Thi-ty-five (35¢) Cents per ton for all coal above the size of Pea Coal, or all coal that passes over a mesh in the screen of three-fourths (¾) of an inch square in the clear, and for all Pea Coal, which is hereby designated and agreed to be such as will pass over a screen seven-sixteenths (7/16) of an inch square mesh, and through a screen of three-fourths (¾) of an inch square mesh, the lessee shall pay the sum of Seventeen and One-half (17½¢) Cents per ton, until the market price of that size at the breaker at which this coal shall be prepared shall be more than one-half (½) the market price of the larges- sizes at the breaker, and the prices to be paid for said Pea Coal shall be increased proportionately above the sum of Seventeen and One-half (17½¢) Cents per ton; for what is known as Buckwheat Coal, or for any smaller size which may become marketable including culm, if marketed and sold, the party of the second part shall pay the sum of Eight and Three-fourths (8¾¢) Cents per ton, until the market price of such coal or culm shall be more than one-fourth (¼) the price of the larger sizes at the breaker, when the price to be paid for such coal or culm shall be increased proportionately above the sum of Eight and Three-fourths (¾¢) Cents per ton.

3. The party of the second part, the lessee, shall pay to the parties of the first part, their heirs, executors, administrators or assigns, during the continuance of this lease or until all of the said coal is mined out and removed (if that shall occur before the expiration of the term of years above stated) the annual rent or royalty of Four Thousand ($4,000.00) Dollars, payable in quarterly instalments of One Thousand ($1,000.00) Dollars each on the 15th day of March, June, September and December in each year. And in consideration of the said annual rent above stated, the party of the second part may mine and remove as much of the said coal, as at the prices per ton above stipulated, shall in the aggregate equal the said annual rental, and in addition thereto the lessee may mine and remove as much more of said coal as they may desire to, always accounting and paying for the same at the prices as above stated, at the end of each quarter, when the instalments of rent above provided for are paid. [fol. 27] If the lessee fails in any year to mine the quantity of coal, which, at the prices agreed upon equals the annual rental paid, they shall be at liberty at any time in the future to mine and remove this deficit without future payment for the same. The parties of the first part, their heirs, executors, administrators or assigns, shall have the right to require the payment of any moneys due them by the provisions of this lease, in legal tender specie or its equivalent provided that in ascertaining such equivalent gold or silver coin may be used as a standard of value, unless such coin should be debased to less than the present standard of fineness, in which event the computation shall be made as of the present standard. A ton of coal under this agreement shall consist of Twenty-two Hundred and Forty (2,240) pounds.

4. The parties of the first part, by themselves, their engineers, surveyors and employees, shall have access to the mine and mining operation in all other parts of this land, and at any and all times, for the purpose of ascertaining the extent and character of the minings operations, and to see whether they are being conducted in accordance with this agreement and generally in a proper manner.

5. The party of the second part, the lessee, shall with each quarterly payment to be made as above stated, submit a statement to the lessors or their agent, showing the amount of coal mined during the preceding quarter, the quantities of each kind of coal and the market price for value per ton f. o. b. at the breaker at which this coal is prepared for market. The mining, shipping and sales books of the party of the second part shall be properly and faithfully kept, and shall at all proper times be open to the inspection of the said lessors or their agent.

6. The party of the second part, the lessee, shall pay all taxes assessed upon the coal, in and upon the said land, as well as upon any improvements erected thereon used and occupied by the party of the second part.

7. The parties of the first part, their heirs and assigns, shall be entitled to receive annually for their personal use only and not for

purpose of sale at the breaker where the coal is prepared for market, thirty-three (33) tons of prepared coal mined from this land, of the size and kind desired, provided that if the said parties of the first part, their heirs and assigns shall fail in any year to apply for said coal, their right to apply for that year's quantity shall cease and determine. Upon coal thus delivered to the lessors, the lessee shall not be required to pay a royalty.

8. The parties of the first part hereby appoint Robert T. Pettebone their Attorney in Fact, to receive and receipt for the moneys to accrue and become due to them under this lease, and it shall be the duty furthermore of the said attorney, or his successor to issue orders to the parties of the first part for their several proportions of the thirty-three (33) tons of coal annually to be furnished them by the lessee, and the lessee shall be bound to deliver the same only upon the orders of the said attorney in fact or his successor. In case of the death or removal of the said attorney in fact, or in case of a vacancy for any cause, the parties of the first part shall in writing appoint his successor, and in case the parties of the first part, their heirs and assigns, after thirty days' notice to fill such vacancy fail to do so, the party of the second part, its successors or assigns may apply to the Court of Common Pleas of Luzerne County, and an attorney in fact, with the same powers and duties, shall be appointed by this Court.

9. It is expressly understood and agreed by the parties hereto that the Pea Coal and all the coal of smaller sizes provided hereinbefore, is to consist and be of the smaller sizes of coal made in the process of breaking in the ordinary and usual manner. The coal as it comes from the mines into the various sizes required by a general [fol. 28] market, which shall, during the screening of the same, fall into the pockets or shoots prepared for the reception of the various sizes as they pass from the breaker over the screens of the size and character designated in a preceding clause thereof. It is further agreed that the operation of Pea Coal and the smaller sizes shall not be greater than that operated at other collieries in the Wyoming Valley in operation at the same time. And in no event shall the Pea Coal and smaller sizes exceed 25 per centum of the whole product of the mine (exclusive of culm or coal dirt) actually shipped therefrom.

10. In case of a strike or suspension of operation on the connecting railroads or among the miners or laborers of the mines within this coal district, or in case of serious faults in the mines or any interruption over which the party of the second part has no control, causing a suspension of mine operations at and within the mines on this land for a period of more than ninety (90) days in any year, then and in that case there shall be a suspension of payment of the minimum rate during and for the time such strike or other interruption shall continue.

11. When the said party of the second part, the lessee, shall have paid for as much coal as they have not mined, as in their opinion

still remains in said premises unmined and capable of being mined, the said lessee may notify the lessor to choose a mining engineer, who with a mining engineer of the lessee shall select a third mining engineer, disinterested in the result, and said three enginers shall thereupon make the necessary examinations for determining the amount of coal still on the property, by actual examination and testing of all the veins, and if they the said engineers or a majority of them shall be of opinion that all of the said coal on said land and property hereby leased and capable of being mined under the terms of this lease, has been paid for, the said lessee shall not thereafter be required to make further payments on account of coal mined or to be mined until they shall have mined out the quantity for which they have paid, and thereafter the lessee shall only be liable to pay for coal mined in excess of the amount already paid for, using due and reasonable diligence to mine the excess of coal which may still remain in said land, and which is capable of being mined therefrom. The cost and expense of such arbitration and examination shall be paid by the lessors and lessees in equal parts.

12. That should any difference arise between the parties hereto in reference to any matter or thing connected with or relating to the provisions of, or in carrying out of this agreement, the same shall be referred to three disinterested persons, of whom each party, lessors and lessee, shall choose one, and the two so chosen shall choose a third, and a decision of a majority of them shall be final and conclusive. But should either party neglect or refuse to so choose a referee, after ten days' notice in writing from the other that they have chosen their referee, then they may choose a second referee, and the two so chosen shall proceed to choose a third, and the decision of a majority of them shall be final and conclusive between the parties hereto. This arbitration proceeding may be had under Act of 1836 and be proceeded with in the Court of Common Pleas of Luzerne County.

13. The party of the second part, the lessee, shall have the right during the continuance of this lease, to transport coal from their lands through the gangways open beneath the lands there' y demised, and after all the coal in these lands to be mined and paid for as aforesaid, has been so mined and paid for, the party of the second part may continue to use the gang and passageways under this land, through which to transport coal from other lands if they desire to do so.

14. It is covenanted and agreed that the lessors shall have the right of distress for the collection of any or all moneys due under this coal lease, and also that should any instalment of rent or royalty [fol. 29] remain unpaid for a period of sixty (60) days after the same is due and payable according to the terms of this agreement, or if the said lessee shall fail to keep and perform any of the provisions of this lease, then the lessors, on giving thirty (30) days' notice in writing to the lessee, may declare, on such notice being given, and such arrearages not being paid or said provisions not being

kept or performed, this lease or agreement to be terminated and at an end. And in case the cause of forfeiture shall thus arise and such cause be expresssly or by implication waived, or the forfeiture be not enforced, the right of forfeiture shall be reserved and be in force whenever and so often as new cause for forfeiture as aforesaid, shall arise; and in case of such forfeiture and a resumption of possession by the lessors, or improvements on the land demised hereby of any nature whatsoever, shall be and remain the property of the said lessors. And it is further agreed that if the lessors shall decide to take possession by legal process, that an affidavit be made that no cause of forfeiture has arisen, as aforesaid, that the required thirty (30) days' notice has been given and also thirty (30) days' notice of the intention to resume possession under the following ejectment clause (which two notices shall be given at one and the same time), and amicable ejectment may thereupon be entered in the Court of Common Pleas of Luzerne County, in which the lessors shall be plaintiffs and the lessee defendant for the lands and premises hereinbefore mentioned and described, and the said lessee does hereby confess judgment in the said amicable ejectment in favor of the lessors, and authorize the Prothonotary of the said Court to enter the same on record against the lessee, as defendant, for the land and premises as aforesaid, without stay of execution, and agrees that a writ of habere facias possessionem may thereupon forthwith issue, and the said lands and premises be delivered to the lessors without further delay, hindrance or molestation.

15. All and singular the grants, covenants, agreements and undertakings hereinbefore contained and made, or which are to be kept and performed by the parties of the first part, shall be binding upon each and every of them, their heirs, executors, administrators and assigns and inure to the benefit of the said party of the second part, their successors and assigns; and all and singular the grants, covenants, agreements and undertakings hereinbefore contained which are to be kept and performed by the said party of the second part, shall be binding on them, their successors and assigns and shall inure to the benefit of each and every of the said parties of the first part, their heirs, executors, administrators and assigns.

In witness whereof, the said parties of the first part have hereunto set their hands and seals, and the party of the second part has caused its seal to be hereunto affixed, attested by its President.

Caroline M. Pettebone, George R. Bedford, Trustee, Lehigh Valley Coal Company, by E. P. Wilbur, President.

Signed, sealed and delivered in the presence of Maggie S. Paine.
Attest: John R. Fanshawe

I hereby assent to the foregoing lease, Dec. 15th, 1888.

Maggie S. Paine.

NOTE.—Acknowledgments are not copied.

[fol. 30] EXHIBIT 2 TO COMPLAINT

Power of Attorney

In the Matter of the Trust Estate for the Benefit of MAGGIE S. PAINE, Formerly MAGGIE S. LEE

Know all men by these presents; that

Whereas, Maggie S. Paine, formerly known as Maggie S. Lee, being the beneficiary of a certain trust created by deed of trust made by said Maggie S. Paine, then Maggie S. Lee, and her then husband, J. Frank Lee, and John Alden Lee, Majorie Lee, Lewis C. Paine and William S. Paine, being the children of the said Maggie S. Paine remaindermen of said trust estate, limited upon the life of their mother, the said Maggie S. Paine, by their certain authorization and direction of the Guardian Trust Company of New York, as substituted trustee under said trust, for the benefit of said Maggie S. Paine, authorized and directed said Company to place the entire matter of the handling of a certain coal lease dated December 15th, 1888, between Caroline L. Pettebone, the then Trustee under said deed of trust into the hands of one Eugene F. Vacheron, an attorney, to be dealt with at his discretion and release the said Guardian Trust Company, as such substituted trustee from all liability or responsibility in connection with the lease; and

Whereas, said Eugene F. Vacheron, has not accomplished the purposes of his retainer in said respect.

Now, therefore, the undersigned, Maggie S. Paine, does hereby revoke any powers as attorney in fact or law, vested in said Eugene F. Vacheron by reason of said papers or authorization and otherwise affecting the said coal lease and any of the rights of any of the parties hereto in connection therewith; and

Said Maggie S. Paine hereby authorizes and directs the said Guardian Trust Company of New York, as such substituted trustee, to place said matter of the handling of said lease into the hands of her present attorney, George W. Glaze, in place and stead of said Eugene F. Vacheron, to be dealt with at his discretion, and hereby releases the said Guardian Trust Company of New York as such substituted trustee from all liability or responsibility from said lease or anything that may be done by him in connection therewith or from any obligation or responsibility of the proceeds of any action he may take, of any suit which he may institute, unless and until the same shall have been paid under the terms of the said trust instrument, and the undersigned, John Alden Lee, Majorie Lee, Lewis C. Paine and William S. Paine, being the remaindermen above mentioned and with the said Maggie S. Paine, being all the parties interested in said property and trust estate, do also release said substituted trustee from all liability or obligation in connection with said lease, or for the results of such action or actions or proceedings that are to be taken through him, the said George W. Glaze, in regard thereto, or of the proceeds of any collections or any suits or

proceedings instituted through him, unless and until the same shall be paid to the said trustee, to be held under said deed of trust and also agree to hold the said trustee harmless from all acts and deeds of said George W. Glaze, in said coal lease.

[fol. 31] In Witness whereof, the parties hereto have hereunto set their hands and seals this 6th day of March, nineteen hundred and eleven.

Maggie S. Paine (Seal), Majorie Lee, (Seal), John Alden Lee (Seal), William S. Paine (Seal), Lewis C. Paine (Seal).

Witness as to Majorie Lee: Lewis C. Paine and William S. Paine and Maggie S. Paine: Esther Joseph.
Witness as to John Alden Lee: Harry Walton.

CITY AND COUNTY OF NEW YORK, ss:

On this 7th day of March, 1911, before me personally appeared Maggie S. Paine and Majorie Lee, to me known and known to me to be the individuals described in and who executed the foregoing instrument and they duly severally acknowledged to me that they executed the same.

Esther Joseph, Com. of Deeds, City of New York.

CITY AND COUNTY OF NEW YORK, ss:

On this 8th day of March, 1911, before me personally appeared Lewis C. Paine and William S. Paine, to me known and known to me to be the individuals described in and who executed the foregoing instrument and they severally acknowledged to me that they executed the same.

Esther Joseph, Com. of Deeds, City of New York.

STATE OF IOWA,
County of Fayette, ss:

On this 21st day of March, 1911, before me a Notary Public in and for the State of Iowa, duly commissioned and sworn and authorized by the laws of the State to take proof or acknowledgments of deeds, and dwelling in said County of Fayette personally appeared John Alden Lee, to me known and described in and who executed the within instrument and acknowledged to me that he had executed the same.

C. B. Chambers, Notary Public in and for Fayette County, Iowa. (Seal.)

STATE OF IOWA,
Fayette County, ss:

I, J. W. Winston, Clerk of the District Court in and for said County, which Court is a Court of Record, having a seal, do hereby certify that C. B. Chambers, by and before whom the foregoing ac-

knowledgment was taken, was at the time of taking the same a Notary Public residing in said County, and was duly authorized by the laws of said state, to take and certify acknowledgments or proofs of deeds of lands and other instruments in said state and county, and that said conveyance and the acknowledgment thereof are in due form of law; and further, that I am well acquainted with the handwriting of said C. B. Chambers, and that I verily believe that the signature to said certificate of acknowledgment is genuine.

[fol. 32] In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court the 22nd day of March, 1911.

J. W. Winston, Clerk of the District Court.

Guardian Trust Company of New York,
170 Broadway, Cor. Maiden Lane

Edward F. Clark, President; Lathrop C. Haynes, Vice President & Secretary; Alfred M. Barrett, Treasurer

New York, January 24th, 1913.

This is to certify that the foregoing is a true copy of an original thereof filed with this Company, and that pursuant thereto this Company has placed the matter of the handling of said lease therein mentioned in the hands of the said George W. Glaze.

Dated New York, January 24th, 1913.

L. C. Haynes, Secretary.

Exhibit 3 to Complaint

Caroline M. Pettebone et al. Lease, December 15, 1888

(Statement showing tonnage mined and royalty value thereof; also payments made under the Caroline M. Pettebone et al. lease, dated December 15th, 1888, from beginning to November 30th, 1912, in lease years as shown below)

Period, year ending	Above pea	Pea	Smaller	Total	Royalty value	Payments
11/30/1889	.....	.....	.....	.....	.....	4,000.00
" " 1890	.....	.....	.....	.....	.....	4,000.00
" " 1891	.....	.....	.....	.....	.....	4,000.00
" " 1892	.....	.....	.....	.....	.....	4,000.00
" " 1893	.....	.....	.....	.....	.....	4,000.00
" " 1894	.....	.....	.....	.....	.....	4,000.00
" " 1895	179.02	46.09	41.17	267.08	74.49	4,000.00
	67. 0%	17. 4%	15. 6%	100.0%		
" " 1896	3,784.13	693.16	715.15	5,194.04	1,508.68	4,000.00
	72. 8%	13. 4%	13. 8%	100.0%		
" " 1897	2,584.04	537.10	773.18	3,895.12	1,066.21	4,000.00
	66. 3%	13. 8%	19. 9%	100.0%		
" " 1898	8,543.19	1,416.17	1,746.12	11,707.08	3,391.17	4,000.00
	73. 0%	12. 1%	14. 9%	100.0%		
" " 1899	13,744.05	2,552.13	3,264.04	19,561.02	5,542.81	4,000.00
	70. 3%	13. 0%	16. 7%	100.0%		
" " 1900	13,565.00	2,851.07	3,981.10	20,397.17	5,595.12	4,000.00
	66. 5%	14. 0%	19. 5%	100.0%		
" " 1901	8,049.11	2,445.00	2,984.08	13,478.19	3,506.33	4,000.00

	59. 7%	18. 1%	22. 2%	100.0%		
[fol. 33]						
" " 1902	1,344.04	189.04	163.05	1,696.13	517.86	2,428.57
	79. 2%	11. 2%	09. 6%	100.0%		
" " 1903	5,998.17	1,840.15	2,045.00	9,884.12	4,376.24	4,000.00
	60. 7%	18. 6%	20. 7%	100.0%		
" " 1904	5,073.08	1,167.16	1,582.02	7,823.06	2,302.35	4,000.00
	64. 9%	14. 9%	20. 2%	100.0%		
" " 1905	6,321.00	1,503.06	2,330.10	10,154.16	2,973.88	1,000.00
	62. 2%	14. 8%	23. 0%	100.0%		
" " 1906	96.08	12.11	27.09	136.08	39.72	.....
	70. 7%	09. 2%	20. 1%	100.0%		
" " 1907	.....	.....	.....	.....	.....	.....
" " 1908	.....	.....	.....	.....	.....	.....
" " 1909	6,227.09	698.12	1,909.09	8,835.10	2,621.01	.....
	70. 5%	07. 9%	21. 6%	100.0%		
" " 1910	5,378.13	450.16	1,225.12	7,055.01	2,115.46	.....
	76. 2%	06. 4%	17. 4%	100.0%		
" " 1911	850.18	74.17	157.14	1,083.09	332.42	.....
	78. 6%	06. 9%	14. 5%	100.0%		
" " 1912	5,192.19	434.05	836.09	6,463.13	2,034.50	.....
	80. 3%	06. 7%	13. 0%	100.0%		
Total	86,934.10	16,915.14	23,785.14	127,635.18	37,998.25	63,428.57
	68. 1%	13. 3%	18. 6%	100.0%		

Dr. Balance November 30th, 1912	$25,430.32
Add. Delayed Minimums—Paid January, 1913	15,500.00
Accrued Royalty Balance as of Nov. 30th, 1912	$40,940.32

Exhibit 4 to Complaint

Agreement of January 21, 1913

This Agreement made this 21st day of January, 1913, between Maggie S. Paine, John Alden Lee, Majorie Lee, Lewis C. Paine and William S. Paine, per and pro George W. Glaze, their attorney in fact, as hereinafter mentioned, parties of the first part, and Lehigh Valley Coal Company, party of the second part, Witnesseth:

Whereas, the said Maggie S. Paine, being the then owner of an equal undivided one-half interest in the coal underlying certain coal lands in Wyoming Borough, Luzerne County, Pennsylvania, and an interest in severalty in the surface thereof, by deed joined in by J. Frank Lee, her then husband, and dated November 7th, 1881, and recorded in the office of the Recorder of Luzerne County, in the State of Pennsylvania, in deed book No. 228, page 184, etc., the said Maggie S. Lee conveyed her said interests to George R. Bedford, and another as Trustees of said lands in trust, among other things, to collect the rents, issues and profits and income arising therefrom, and to pay over the net income to the said Maggie S. Lee during her life and upon her death to distribute and turn over the principal and interest to her children living at the time of her decease; and

Whereas, by indenture of lease dated December 15th, 1888, and recorded in the proper office in Luzerne County, in deed book No. 424, page 379, the said George R. Bedford, as surviving Trustee of the said Caroline M. Pettebone, as owner of the other undivided one-half interest therein, leased to the said Lehigh Valley Coal Company, all of the merchantable anthracite coal in and upon a certain tract of land in the Borough of Wyoming, said County and State, and more particularly described therein for a period of nine hundred and ninety-nine years; and

[fol. 34] Whereas thereafter the said J. Frank Lee died and the said Maggie S. Lee married one William L. Paine, who has since died, and the said Maggie S. Lee is known as Maggie S. Paine; and

Whereas John Alden Lee, Majorie Lee, Lewis C. Paine and William S. Paine are all of the children of the said Maggie S. Lee, (now Maggie S. Paine), and are all full of full age and sound mind; and

Whereas by proceedings duly had said trust has been transferred to the State of New York, and including the said interest in and to said lease by mesne succession, is now vested in the Guardian Trust Company of New York, (a corporation organized and existing under the laws of the State of New York) as substituted trustee; and

Whereas, it is provided in the said lease that when the lessees shall have paid for as much coal remaining unmined as in their opinion still remains in the said premises unmined and capable of being mined, an arbitration shall be had to determine the facts, as by reference to Clause No. 11 in the said lease will more fully and at large appear; and

Whereas some time after March, 1905, the Lessee Company gave notice to the lessors that it had paid for all the mineable coal and

requested the lessors to agree upon arbitrators to determine the matter as in said clause provided. The lessors, however, and the lessees, being unable to agree upon arbitrators, the lessors gave notice of their intention to revoke the said amicable submission, and no arbitration, in pursuance of said clause, was proceeded with, and the matter has never been determined; and

Whereas by power of attorney, original of which was deposited and is now on deposit with the said Guardian Trust Company as such substituted trustee, and of which a true copy is hereto annexed, certified as such by the said Trust Company, the said Maggie S. Paine, beneficiary of income of said Trust, authorized and directed the said Guardian Trust Company of New York as such substituted Trustee to place the handling of said dispute into the hands of the undersigned, George W. Glaze, attorney and counselor-at-law, to be dealt with at his discretion, and thereby released the said Guardian Trust Company of New York as such substituted Trustee from all liability or responsibility as to said lease, or as to anything that may be done by the said George W. Glaze in connection therewith, and from any obligation or responsibility as to the proceeds of any action that he may take or of any suit that he may institute unless and until such proceeds shall have been paid under the terms of said trust instrument; and the said John Alden Lee, Majorie Lee, Lewis C. Paine and William S. Paine, *benig* the remaindermen above mentioned, and, with the said Maggie S. Paine, being all the parties mentioned in the said trust estate thereof, also released the said substituted Trustee from all liability or obligation in connection with said lease or from the results of said action, actions or proceedings that are to be taken through the said George W. Glaze or of the proceeds of any collection, or any suits or proceedings instituted through him, unless and until the same shall be paid by him to the said Trustee to be held under said deed of trust;

Whereas, the lessors are now demanding that the lessee shall pay the whole minimum which accrued under the provisions of the said lease, from and after March, 1905, to the present:

Now This Agreement Witnesseth: That the party of the second part, in consideration of the covenants hereinafter recited to be kept and performed by the parties of the first part, hereby agrees to pay, on the execution of this agreement, to Frank G. Darte, the attorney in fact for the lessor interests, the equivalent of fifty per cent of the annual minimum rental accrued and unpaid since March, 1905, with the full interest due on each installment from the time the same came due down to date, and to proceed to mine the coal in and under the demised premises at a rate of mining which will produce in royalty the equivalent of the minimum rental each year for three years next following the date hereof, and thereafter to mine with due diligence until the coal is exhausted, and pay the stipulated royalty for each ton mined and removed.

[fol. 35] The Parties of the First Part, in consideration of the covenants above recited, to be fully kept and performed by the party

of the second part, hereby agree to accept their share of the payment of fifty per cent of the minimum due since March, 1905, with interest as aforesaid in full of their share for minimum rental up to the date hereof.

And the Parties of the First Part, for a further and separate consideration of One Dollar, to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, agree, in conjunction with the other lessor interest, to forthwith submit the question, whether the mineable coal remaining in the demised premises has already been paid for by the party of the second part by advanced minimum payments, to a board of arbitrators composed of mining engineers, one of whom shall be the chief mining engineer of party of the second part, one of the mining engineers chosen by the parties of the first part and the other lessor interest, and if they cannot agree, another distinterested mining engineer whom the two arbitrators thus chosen shall agree upon, or who shall be approved by the Court of Common Pleas of Luzerne County, Pennsylvania, whose decision, or the decision of any two of whom, shall be final and conclusive on the parties. In case the parties of the first part and the other lessor interest, shall neglect or refuse to name their arbitrator within thirty days after the payment of the amount to be paid under this agreement, as aforesaid, they will make no further claim for minimum rental.

The arbitrators will first estimate the amount of mineable coal left in the demised premises.

If the arbitrators decide that the coal in the ground has been more than paid for by advanced minimum payments, then the party of the second part shall be relieved from any further minimum payments until the equivalent of the over-payment has been mined and removed, and thereafter shall pay only royality per ton for coal actually mined and removed. If the arbitrators decide that the coal remaining in the ground after three years' mining at the minimum rate, will exceed the amount paid for by the party of the second part, then the party of the second part will continue to mine or pay for the minimum quantity until the amount of mineable coal fixed by the arbitrators shall be paid for, and if it shall then appear that the estimate of the arbitrators was too small and that there is mineable coal remaining in the premises, the party of the second part will continue to mine diligently until the coal is exhausted, and to pay the stipulated royalty per ton for all coal mined and removed.

This submission to arbitrators may be made a rule of the Court of Common Pleas of Luzerne County aforesaid, under the provisions of the 1st section of the Act of Assembly approved June 16, 1836, P. L. 717, and its supplements.

The party of the second part agrees to pay the costs of said arbitration up to the amount of five hundred ($500) Dollars, any costs over that amount to be equally divided between the parties.

It is Agreed that the covenants and conditions above set forth shall bind the parties, their heirs, executors, administrators, successors or assigns.

Witness the hand and seal of the party of the first part, and the corporate seal of the party of the second part, duly attested by the proper officers, the day and year aforesaid.

Maggie S. Paine, J. Alden Lee, Marjorie Lee, Lewis C. Paine, and William S. Paine, per and pro George W. Glaze (Seal), Their Attorney in Fact. Lehigh Valley Coal Company, by E. B. Thomas, President.

[fol. 36] Attest: F. J. McQuade, Secretary. (Seal.)
Approved as to form. F. W. W.

STATE OF NEW YORK,
County of New York, ss:

On this 24th day of January, 1913, before me, a Commissioner of Deeds, in the City of New York, personally appeared George W. Glaze, the person mentioned in and who executed the foregoing agreement to be the act and deed of Maggie S. Paine, J. Alden Lee, Majorie Lee, Lewis C. Paine and William S. Paine, and through him as attorney in fact and who desire that the same be recorded as such.

Witness my hand and official seal the day and year first above written.

John Mithelz, Com. of Deeds, N. Y. City, 59.

EXHIBIT 5 TO COMPLAINT

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

HECTOR M. HITCHINGS, as Trustee of the Estate of Maggie S. Paine, Plaintiff,

vs.

THE LEHIGH VALLEY COAL COMPANY, Defendant

Complaint

Plaintiff complains of the defendant and on information and belief respectfully shows to this Court:

First. At all the times hereinafter mentioned the defendant herein was a foreign corporation organized and existing under the laws of the State of Pennsylvania but it had duly procured a license and was and is authorized and empowered to do business in the State of New York and it has an office for the transaction of such business at 143 Liberty Street in the City, County and State of New York, and has designated a person within the State of New York upon whom process can be served.

Second. On or about November 7, 1881, one Maggie S. Lee, being the owner of an equal, undivided, one-half interest in the coal under-

lying certain coal lands in Wyoming Borough, Luzerne County, Pennsylvania, and an interest in severalty of the surface thereof, by deed joined in by J. Frank Lee, her then husband, and dated November 7, 1881, and recorded in the office of the Recorder of Luzerne County, in the State of Pennsylvania, in Deed Book No. 228, page [fol. 37] 184, et seq., duly conveyed all of her said interest to George R. Bedford and John Wroth, Jr., in trust, among other things, to lease the same and to collect the rents, issues, profits and income arising therefrom and to pay over the net income thereof to the said Maggie S. Lee during the term of her life, and upon her death, to distribute and pay over the principal and interest thereof to her children living at the time of her decease.

Third. Subsequently to November 7, 1881, various trustees have been duly and lawfully and by proper orders of Courts of Competent Jurisdiction and upon the petition of said Maggie S. Lee and her children substituted in the place and stead of said George R. Bedford and John Wroth, Jr., the original trustees and their substitutes and successors in interest. That said Maggie S. Lee, subsequently to November 7th, 1881, became discovert and married one William L. Paine and that said William L. Paine thereafter died but that his said wife, Maggie S. Paine, and four children, to wit: John Alden Lee and Marjorie Lee, children of the first marriage, and Lewis C. Paine and William S. Paine, children of the second marriage survived him, and all are now living. On September 24th, 1913, upon the petition of said Maggie S. Paine, John Alden Lee, Marjorie Lee, Lewis C. Paine and William S. Paine, and upon the resignation and consent of The Guardian Trust Company of New York City and State, the then acting trustee of said trust, Hector M. Hitchings of the City of New York, the plaintiff in this action, was duly appointed by the Supreme Court of the State of New York, trustee of the said property of Maggie S. Lee, and of its rents, issues and profits and the final successor in the trust of the said George R. Bedford and John Wroth, Jr., and that he duly qualified and entered upon the performance of the duties of said trust, and, as such trustee, has succeeded to and is now possessed of all the original rights and interests of said George R. Bedford and John Wroth, Jr., and of their substitutes and successors in and to the agreement of lease hereinafter set out.

Fourth. On or about the 15th day of December, 1888, there was duly signed, executed and delivered, between the parties named therein, a lease of the coal land mentioned therein in the manner and form set out in the copy hereto attached and hereby referred as a part hereof. That said agreement of lease was under seal and was, immediately thereafter, duly recorded in the office of the Recorder of Luzerne County, Pennsylvania, in deed book No. 424 at page 379 et seq., and that the lessee named in said indenture of lease, viz: The Lehigh Valley Coal Company, is the same corporation named as the defendant in this action. That said defendant at once duly entered into the full and uninterrupted possession of said lands under the terms and conditions of said lease and has continued in

such possession from the date of said lease to the present time and is now in such possession.

Fifth. On information and belief that for the years 1889, 1890, 1891, 1892, 1893 and 1894, said defendant negligently failed to mine the underlying coal in said leased premises but paid nevertheless in each and every year specified the minimum royalty of Four thousand dollars ($4,000) per year named in said lease, one-half of which payment was paid to and received by the then trustee or trustees of said Maggie S. Lee, now Maggie S. Paine. That for the seven years beginning with the year 1895 and ending with the year 1901, said defendant mined coal from said lands sometimes in excess of said minimum royalty of Four thousand dollars ($4,000) per year and sometimes in a less amount, but that it continued to pay said minimum royalty of Four thousand dollars ($4,000) per year for each and every of said years. In the year 1902 said defendant paid the then trustee a total amount of $2,428.57 instead of $4,000. In the years 1903 and 1904, it paid said $4,000 per year, and in the year 1905, it paid $1,000 only, and that thereafter and for the years 1906, 1907, 1908, 1909, 1910, 1911 and 1912 it failed, [fol. 38] neglected and refused to pay any rent or any minimum royalties whatever, either the fixed minimum royalty or the pro rata royalty on the output of the mining done by it. Attached hereto as Exhibit 2 will be found a transcript from the year 1889 to 1912 of the coal extracted by the defendant, of the leasehold value of each grade and size thereof, of the total royalty value of such mined coal, and of the full amount of royalty paid by the defendant each year, to which Exhibit 2 plaintiff hereby refers as a part of this allegation.

Sixth. By the express terms of said lease, Exhibit 1 hereto attached, and by the settled law of the State of Pennsylvania relating to leases in all respects similar to the lease with this defendant, defendant was obligated to pay each year during the term of said lease the minimum royalty named in said lease, to wit, $4,000, until all of the said merchantable and mineable coal was mined out and removed, said minimum royalty being held to be the equivalent of a yearly rent for the exclusive occupation and use of said premises, whether the same was actually used or not and whether the said coal therein was actually mined or not. In 1905 when said defendant wholly ceased to pay said minimum royalties, there was in said lands, capable of being mined, merchantable coal to the amount of one hundred and seventy-six thousand tons and of a mean royalty value of $52,800 and there were vast quantities of coal in lower strata in said properties which defendants have never reasonably or properly explored or attempted to mine, and that without such explorations and attempts at mining it is impossible to state whether the same is merchantable or mineable with present methods and appliances. In January and February of 1913, at the time of the pretended settlement hereinafter set out, there was in said lands and property, merchantable coal capable of being mined, to the amount of 145,170 tons and of a mean royalty value of $45,693.88, and there was also all of said lower, unexplored and untested strata

Seventh. In January, 1913, said defendant was indebted to the successors of the original lessors, under and by the terms of said lease, and in accordance with the aforesaid laws and decisions of Pennsylvania, for unpaid minimum royalties and rent with interest thereon, in the sum of Forty-five thousand three hundred and seventy-three and 56/100 Dollars ($45,373.56), one-half of which amount was the property of the estate of said Maggie S. Paine, and there was still in said property, unmined as aforesaid, the merchantable coal described in the last paragraph.

Eighth. On or about January 21st, 1913, an agreement in writing was made, executed and delivered between one George W. Glaze, acting for the cestui que trust and remaindermen in this trust, and this defendant, copy whereof is hereto attached and hereby referred to and made a part of this allegation, as Exhibit 3, and that, under and pursuant to the terms of this agreemnt, there was paid over by defendant to and for the use of the said cestui que trust and remaindermen now represented by the plaintiff, one-half of the unpaid minimum royalties to that date, with interest thereon, said payment amounting to the sum of $11,343.39.

Ninth. That under and pursuant to the terms of said agreement, Exhibit 3, James H. Hughes and John M. Humphrey were appointed arbitrators by the respective parties thereto and that said arbitrators have duly made, signed, filed and delivered their determination, report and decision in the manner and form mentioned and set out in Exhibit 4 hereto attached and hereby referred to as a part of this allegation.

Tenth. At the time of the making and delivery of the agreement, Exhibit 3, in the eighth paragraph set out and of the payment of said $11,343.39, said defendant, The Lehigh Valley Coal Company, was legally, justly and equitably indebted to the estate of said Maggie S. Paine, under, by and pursuant to the terms and requirements [fol. 39] of said Exhibit 1, in the sum of $22,686.78, and that it had no legal or just offsets or counterclaims against the same; that said payment of one-half of the amount due was a payment made with the moneys of the estate of said Maggie S. Paine and not of this defendant; that said settlement and agreement was not a settlement of compromise of a disputed claim but was void and of no force or effect as a final and complete settlement by the defendant of the amounts then due and owing by it, under the laws and well settled decisions of the State of Pennsylvania in which State the same took place and was good as an accord and satisfaction only for the amount actually paid; that any rights under the lease to mine coal from the leased premises, to make up deficiencies between the minimum royalties paid each year and the amount of coal mined, had long been waived, abandoned and lost by laches and by the Statutes of Limitations of the State of Pennsylvania; that inasmuch as said defendant from March, 1905, to January, 1913, was in full, uninterrupted and exclusive possession of said premises its refusal to make minimum royalty payments in accordance with the terms and

requirements of said written lease, was an unlawful and wrongful refusal, and that, by reason of the premises, the defendant is now justly indebted to this plaintiff for the one-half of said rents which was unpaid on January 21st, 1913, to wit: For the sum of $11,343.39, with interest thereon from the 21st day of January, 1913.

And for a second cause of action:

Eleventh. Plaintiff here reiterates and repeats all the allegations in the first cause of action above as though more fully and at large set out herein.

Twelfth. Defendant is indebted to this plaintiff, under and pursuant to the terms and provisions of said lease hereto attached as Exhibit 1, for one-half of the minimum royalties called for by said lease and which became due and owing on the 15th days of March, June, September and December, 1913, to wit: For the sum of Two thousand dollars ($2,000), with average interest thereon from the 15th day of June, 1913, no part of which has been paid to this plaintiff or to any other person to or for this plaintiff, although payment thereof has been duly demanded.

Wherefore plaintiff demands judgment against the defendant for said sum of $11,343.39, with interest thereon from January 21st, 1913, and for the sum of Two thousand dollars ($2,000), with interest thereon from the 15th day of June, 1913, and for the costs of this action.

Fayette B. Dow, Attorney for Plaintiff. Office and P. O. Address, 100 William St., Borough of Manhattan, New York City.

STATE OF NEW YORK,
County of New York, ss:

Hector M. Hitchings, being duly sworn, deposes and says: That he is the plaintiff herein; that he has read and knows the contents of the foregoing complaint, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Hector M. Hitchings.

Sworn to before me this 13th day of January, 1914. Susan V. Noble, Commissioner of Deeds, City of New York, No. 6.

[fol. 40] Copy

New York Supreme Court, New York County

Hector M. Hitchings, as Trustee of the Estate of Maggie S. Paine, Plaintiff,

against

Lehigh Valley Coal Company, Defendant

Answer

Defendant, answering the complaint of the plaintiff herein, avers and alleges:

Answering the first alleged cause of action:

First. Defendant admits the allegations contained in paragraphs or subdivisions of the complaint numbered or designated First and Second.

Second. Defendant admits the allegations contained in paragraph or subdivision of the complaint numbered or designated Third, except that defendant denies that it has any knowledge or information thereof sufficient to form a belief as to the allegations therein contained, or any of them, that on the 24th day of September, 1913, or at any other time, the plaintiff in this action, Hector M. Hitchings, was duly appointed by the Supreme Court of the State of New York, Trustee of the property of Maggie S. Lee, now Maggie S. Paine, and the final successor in the trust of George R. Bedford and John Wroth, Jr., as alleged in the complaint or otherwise, or that the said Hector M. Hitchings has duly or otherwise qualified and entered upon the performance of the duties of said trust, or that, as such trustee, or otherwise, he has succeeded to and is now possessed of all or any of the original rights and interests of George R. Bedford and John Wroth, Jr., or either of them, or of their substitutes or successors in and to the agreement of lease to which reference is made in said paragraph or subdivision of said complaint.

Third. Defendant admits the allegations contained in paragraph or subdivision of the complaint numbered or designated Fourth, except that it refers to the original of the lease of the coal lands therein mentioned for the full and correct terms and provisions thereof, and except that upon information and belief it denies that upon the execution and delivery of said lease it entered into any possession of the lands therein mentioned other than into such constructive possession thereof as arose from said execution and delivery of said lease.

Fourth. Defendant admits the allegations contained in paragraph or subdivision of the complaint numbered or designated Fifth, except that upon information and belief it denies that for the years

1889, 1890, 1891, 1892, 1893 and 1894, or any of them, or at any other time, defendant negligently failed to mine the underlying coal in said leased premises or any part thereof, and except that it denies that during the years 1906 to 1912 inclusive or any of them or at any other time it failed, neglected or refused to pay any rent or royalties which it was obligated by said lease or otherwise to pay.

Fifth. Upon information and belief defendant denies each and every allegation contained in the paragraphs or subdivisions of the [fol. 41] complaint numbered or designated Sixth and Seventh, except that it admits that on or about the 9th day of September, 1913, the arbitrators appointed pursuant to the agreement in writing bearing date the 21st day of January, 1913, and made on or about that date by and between Maggie S. Paine and others as parties of the first part, and defendant as party of the second part (a copy of which is annexed to the complaint herein marked Exhibit 3), pursuant to the terms and provisions thereof, made their report in writing bearing date that day (a copy of which is annexed to the complaint herein marked Exhibit 4), wherein and whereby, among other things, it was stated that there remained in the leased premises 149,170.11 tons of good merchantable coal capable of being mined, of the value, at prices based on the average rate received for the year 1912, viz.: 31.476 cents per ton, upon which royalties at the figures named in the lease therein referred to would equal $45,693.88.

Sixth. Upon information and belief defendant denies each and every allegation contained in paragraph or subdivision of the complaint numbered or designated Eighth, except that it admits that on or about January 21st, 1913, an agreement in writing was made, executed and delivered between George W. Glaze, acting for the cestui que trust and remaindermen in said trust, and defendant, a copy of which is attached to the complaint as Exhibit 3, and that thereupon under and pursuant to the terms of said agreement defendant paid to and for the use of the said cestui que trust and remaindermen the sum of $11,343.39, and except that defendant denies that it has any knowledge or information thereof sufficient to form a belief as to the allegation therein contained that the plaintiff now represents the said cestui que trust and remaindermen in said trust.

Seventh. Defendant admits the allegations contained in paragraph or subdivision of the complaint numbered or designated Ninth.

Eighth. Upon information and belief defendant denies each and every allegation contained in paragraph or subdivision of the complaint numbered or designated Tenth.

Answering the second cause of action:

Ninth. Answering the allegations contained in the paragraph or subdivision of the complaint numbered or designated Eleventh, de-

fendant here reterates, realleges and repeats each and every of the allegations, admissions and denials contained in the paragraphs or subdivisions of this answer; numbered or designated First to Eighth inclusive and hereinabove set forth in answer to the allegations contained in the first alleged cause of action set forth in the complaint as fully and at large and with like force and effect as if the said allegations, admissions and denials were herein respectively set out at length.

Tenth. Upon information and belief defendant denies each and every allegation contained in paragraph or subdivision of the complaint numbered or designated Twelfth.

II

As a first and further separate and distinct and partial defense to the first alleged cause of action set forth in the complaint defendant avers and alleges upon information and belief:

1. That in and by the indenture of lease bearing date the 15th day of December, 1888, and made on or about that day by and between Caroline M. Pettebone and George R. Bedford, Trustee for Maggie S. Paine, and defendant, and mentioned and referred to as [fol. 42] a part therof in and by paragraph or subdivision of the complaint numbered or designated Fourth, it was, among other things, expressly provided and agreed that in case of a strike or suspension of operations on the connecting railroads or among the miners or laborers of the mines within the coal district wherein the leased lands were situate, causing a suspension of mining operations at and within the mines on said leased lands for a period of more than ninety (90) days in any year, then and in that case there should be a suspension of payment of the minimum rent during and for the time such strike should continue.

2. That during said year of 1902 there was a general strike among the miners and laborers of all of the mines within the anthracite coal regions in the State of Pennsylvania, being the coal district wherein the said leased lands were situate, which said strike began on or about the 12th day of May, 1902, and continued until on or about the 23rd day of October, 1902. That said strike caused a suspension of all mining operations at and within the mines on the said leased lands for the whole of said period. That by reason of said suspension or operation and under the terms of the said lease payment of the minimum royalty for the said year of 1902 was suspended during the continuance of said period and in consequence thereof the total amount of royalty due for said year was the sum of $2,428.57 only, the whole of which has been duly paid by defendant as required by said lease.

III

As and for a second and further separate and distinct defense to the first and second alleged causes of action set forth in the com-

plaint and each of them defendant avers and alleges upon information and belief:

1. That in and by the indenture of lease bearing date the 15th day of December, 1888, and made on or about that date by and between Caroline M. Pettibone and George R. Bedford, Trustee for Maggie S. Paine, and defendant, and mentioned and referred to as a part thereof in and by paragraph or subdivision of the complaint numbered or designated Fourth, it was among other things expressly provided in and by clauses 11 and 12 thereof as follows:

"11. When the said party of the second part, the lessee, shall have paid for as much coal as they have not mined, as in their opinion still remains in said premises unmined and capable of being mined, the said lessee may notify the lessor to choose a mining engineer, who with the mining engineer of the lessee shall select a third mining engineer, disinterested in the result, and said three engineers shall thereupon make the necessary examinations for determining the amount of coal still on the property, by actual examination and testing of all the veins, and if they the said engineers or a majority of them shall be of opinion that all of said coal on said land and property hereby leased and capable of being mined under the terms of this lease, has been paid for, the said lessee shall not thereafter be required to make further payments on account of coal mined or to be mined until they shall have mined out the quantity for which they have paid, and thereafter the lessee shall only be liable to pay for coal mined in excess of the amount already paid for, using due and reasonable diligence to mine the excess of coal which may still remain in said land, and which is capable of being mined therefrom. The cost and expense of such arbitration and examination shall be paid by the lessors and lessee in equal parts.

"12. That should any differences arise between the parties hereto in reference to any matter or thing connected with or relating to the provisions of, or in carrying out of this agreement, the same shall [fol. 43] be referred to three disinterested persons, of whom each party, lessors and lessee, shall choose one, and the two so chosen shall choose a third, and a decision of a majority of them shall be final and conclusive. And should either party neglect or refuse to so choose a referee, after ten days' notice in writing from the other that they have chosen their referee, then they may choose a second referee and the two so chosen shall proceed to choose a third, and the decision of a majority of them shall be final and conclusive between the parties hereto. This arbitration proceeding may be had under Act of 1836 and be proceeded with in the Court of Common Pleas of Luzerne County."

2. That on or about the 16th day of June, 1905, defendant had paid for as much coal as it had not mined, as in its opinion still remained in the leased premises unmined and capable of being mined and thereupon, and in pursuance of said provisions of said lease gave due notice in writing to the executors of the will of the said Caroline

M. Pettebone, then deceased, and to the said George R. Bedford, Trustee for Maggie S. Paine, that it had paid for as much coal not mined as in its opinion still remained in the demised premises unmined and capable of being mined, and thereupon notified the said executors of the will of said Caroline M. Pettebone and the said George R. Bedford as Trustee for Maggie S. Paine, to choose a mining engineer under the provisions of said eleventh clause of said lease, who with the mining engineer of defendant should select a third mining engineer, disinterested in the result, to make the necessary examinations for determining the amount of coal still on the leased property by actual examination and testing of all of the veins, who should make a report thereon. That in and by said notice the said executors of the will of the said Caroline M. Pettebone and the said George R. Bedford, Trustee for Maggie S. Paine, were further duly notified by defendant that if they should fail or refuse to choose a mining engineer in pursuance of the said eleventh clause of said lease, within ten days after the service of said notice upon them, that the lessee, the defendant, would choose a referee under said twelfth clause of said lease, and if said parties failed or refused to appoint a referee under said twelfth clause of said lease, defendant would then choose another referee and the two so chosen would choose a third, who would constitute a board of referees, and that the submission to them would be made a rule of court under the Act of 1836 of the State of Pennsylvania and would be proceeded with in the Court of Common Pleas of Luzerne County, Pennsylvania, aforesaid, as by said Act provided. That thereafter and on or about the 23rd day of June, 1905, the said executors of the will of the said Caroline M. Pettebone, then deceased, and the said George R. Bedford, Trustee of Maggie S. Paine, gave or caused to be given an alleged notice that they would elect to revoke the said arbitration clause in said lease hereinabove referred to, and they thereafter declined and refused to enter into an arbitration as provided in said lease, and continued and persisted in said refusal until on or about the 21st day of January, 1913. That between the said 23rd day of June, 1905, and the said 21st day of January, 1913, there had been disputes between the parties to said lease and their successors in interest as to various matters arising out of or connected with said lease and among others as to whether or not the amount of royalties paid prior to June, 1905, by defendant, covered all of the coal it had not then mined and which then remained in the leased premises unmined and capable of being mined and as to whether or not there still remained in said premises unmined and capable of being mined any additional merchantable coal; and a dispute arose between the said lessors and their successors in interest and defendant, the lessee, the said lessors and their successors in interest claiming that defendant was bound to continue the payment of minimum royalties after June, 1905, and defendant, the lessee, claiming that it was not so bound, and that it had paid in full for all of the coal not then mined and which then remained in [fol. 44] the leased premises unmined and capable of being mined; and the lessors and their successors in interest claimed that they had a right by reason of the failure of defendant to pay royalties after

said June, 1905, to forfeit said lease, and defendant denied the said right to forfeit said lease; and said lessors and their successors in interest were demanding payment in full of all minimum royalties which they claimed were provided to be paid under the terms of said lease and defendant was refusing payment thereof for the reasons aforesaid.

3. That thereafter and on or about the 21st day of January, 1913, and in full settlement, compromise and adjustment of any and all disputes then or at any time theretofore existing between the parties and of the minimum royalties or other sums or claims for minimum royalties or other sums then due or claimed to be due to the lessors or their successors in interest, an agreement in writing bearing date that day was duly made and entered into by and between the said Maggie S. Paine and others interested in said lease and royalties thereunder, as parties of the first part, and defendant as party of the second part, wherein and whereby it was among other things provided and agreed that defendant should pay to or on account of the lessor interests a certain sum computed as therein specified, the share of which sum payable to or for the account of the parties of the first part to said agreement amounted to the sum of $11,343.39, and should proceed to mine the coal in and under the demised premises at a rate of mining which would produce in royalty the equivalent of the minimum rental each year for three years next following the date of said agreement, and thereafter that defendant should mine with due diligence until the coal in said leased premises was exhausted, and should pay the stipulated royalty for each ton mined and removed. That in consideration thereof the said Maggie S. Paine and other parties of the first part to said agreement therein and thereby agreed to accept said amount in full of their share of minimum rental up to the date of said agreement.

4. That on said 21st day of January, 1913, defendant paid to the said Maggie S. Paine and said other parties of the first part to said agreement, and they duly accepted, the said sum of $11,343.39 in full settlement, compromise, payment and discharge of all minimum royalties due or alleged to be due from the defendant under the terms of said mining lease to the date of said payment.

IV

As and for a third and further separate and distinct and partial defense to the first and second alleged causes of action set forth in the complaint and each of them defendant avers and alleges upon information and belief:

1. Defendant here reiterates, realleges and repeats each and every allegation contained in paragraphs numbered or designated 1, 2 and 3 of the third and further separate and distinct defense to the first and second alleged causes of action set forth in the complaint and each of them as fully and at large and with like force and effect as if said allegations were herein set out at length.

2. That in and by said agreement bearing date the 21st day of January, 1913, it was, among other things, further provided and agreed that the parties thereto should submit the question whether the minable coal remaining in the demised premises had then already been paid for by defendant by advanced minimum payments, to a board of arbitrators to be selected, as provided in said agreement, whose decision should be final and conclusive on the parties thereto, and that if said arbitrators should decide that the coal in the ground [fol. 45] had been more than paid for by advanced minimum payments, then defendant should be relieved from any further minimum payments until the equivalent of the overpayment had been mined and removed, and that thereafter defendant should pay only royalty per ton for coal actually mined and removed, and that if said arbitrators should decide that the coal remaining in the ground after three years' mining at the minimum rate would exceed the amount paid for by defendant then defendant should continue to mine or pay for the minimum quantity until the amount of minable coal fixed by said arbitrators should be paid for, and if it should then appear that the estimate of the arbitrators was too small and that there was minable coal remaining in the premises, defendant should continue to mine diligently until the coal was exhausted and pay the stipulated royalty per ton for all coal mined and removed.

3. That thereafter an arbitration was duly had by said parties under and in pursuance of the terms of said agreement and as therein provided, and on or about the 9th day of September, 1913, the arbitrators thereunder duly made their report thereof in writing, a copy of which report is attached to the complaint herein as Exhibit 4. That said arbitrators found and reported, as appears by said report, that the royalty payments made by defendant to the lessors under the terms of said lease dated December 15th, 1888, in excess of the coal actually mined on November 30th, 1912, amounted to the sum of $40,930.32, said sum being inclusive of the equivalent of minimum rentals theretofore paid by defendant under said agreement dated January 21st, 1913, and said arbitrators further found and reported that there then remained in the leased premises good merchantable coal capable of being mined upon which the royalties at the figures named in said lease would equal $45,693.88, and that in pursuance of said arbitration and said finding and report defendant became liable to the parties interested in said minimum royalties in the sum of $4,763.56, one-half of which amount, or $2,381.78, was and thereupon became due and payable to the said Maggie S. Paine.

4. That on or before the commencement of this action defendant duly tendered to the said Maggie S. Paine and to her duly authorized representatives and attorneys in fact the said sum of $2,381.78 in payment of the amount to which she was entitled under and in pursuance of said arbitration, but that said Maggie S. Paine refused to receive or accept the same or any part thereof, and that defendant has ever since remained and still is ready and willing and hereby offers to pay the said sum to the said Maggie S. Paine.

5. That defendant has upon its part duly performed all of the terms and conditions of the said agreement dated January 21st, 1913.

V

For a fourth and further separate and distinct defense to the first and second alleged causes of action set forth in the complaint and each of them defendant avers and alleges upon information and belief:

That before the commencement of this action defendant paid, satisfied and discharged the plaintiff's alleged claims and each of them and every part thereof set forth in the complaint by payment of the same in full, excepting the sum of $2,381.78, payment of which this defendant has duly tendered, but that said tender has been refused.

[fol. 46] Wherefore, defendant demands judgment dismissing the complaint herein with costs.

Alexander & Green, Attorneys for Defendant. Office and P. O. Address, No. 165 Broadway, Borough of Manhattan, New York City, N. Y.

State of New York,
County of New York, ss:

Horace J. McQuade being duly sworn, deposes and says: That he is an officer, to wit, the Secretary of Lehigh Valley Coal Company, the defendant named in the foregoing answer; that he has read the said answer and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

That the reason why this verification is not made by the defendant is that said defendant is a foreign corporation.

That the sources of deponent's information and the grounds of his belief as to all matters in the foregoing answer not stated of his own knowledge are the books, records and papers of the defendant corporation, statements made to deponent by other officers and agents of said defendant corporation, besides his own knowledge as such Secretary.

Horace J. McQuade.

Sworn to before me this 17th day of March, 1914. C. L. Malcoln, Notary Public, Kings Co. No. 192. Certificate filed in N. Y. Co. No. 53. (Seal.)

EXHIBIT 6 TO COMPLAINT

Resignation of Hitchings; Appointment of Lee, as Trustee

Agreement made and entered into this 29th day of March A. D. 1921, by and between Hector M. Hitchings, Lewis C. Paine and William S. Paine, parties of the first part, and John Alden Lee of the City, County and State of New York, party of the second part,

Witnesseth:

Whereas, heretofore and on or about the 7th day of November 1881, one Maggie S. Paine, mother of John Alden Lee, Lewis C. Paine and William S. Paine, executed a trust deed to George R. Bedford and John Wroth, Jr., wherein and whereby she devised and bequeathed certain properties to her grantees in trust for her use during life and remainder to her children her surviving; and

Whereas, said George R. Bedford and said John Wroth, Jr., have been succeeded in the trust by and through due and proper orders of court until October 7th, 1913, when Hector M. Hitchings, one of the parties hereto, was duly appointed trustee and continued to act as such trustee down to the death of said Maggie S. Paine, which occurred on the 31st day of May, 1917, and thereafter continued as trustee of the children of said Maggie S. Paine as provided by an agreement bearing date July 21, 1917; and

[fol. 47] Whereas, said Maggie S. Paine at her death on May 31, 1917, left a last Will and Testament which has affected the trust estate and the rights of her children therein; and

Whereas, the trust estate is now in force and effect and consists of real property in Luzerne County, State of Pennsylvania, under lease to the Lehigh Valley Coal Company, and of an apartment house at 612 West 112th Street, known as the "Porterfield," and of certain rents now due and owing thereon and of certain cash on hand with Hector M. Hitchings, one of the parties hereto; and

Whereas, it has become desirable for all parties that a change in trustee should be made and that said Hector M. Hitchings should resign as such trustee, and that John Alden Lee should be appointed in his place and stead and that said Hector M. Hitchings should turn over to said John Alden Lee the entire care, custody and management of the trust estate, together with the cash in bank and all leases of the Porterfield and all outstanding accounts for and against the same.

Now, therefore, this agreement witnesseth:

(1) That the resignation of said Hector M. Hitchings as trustee be, and the same hereby is, accepted, and that said John Alden Lee be, and he hereby is, made, constituted and appointed in the place and stead of said Hector M. Hitchings, as trustee, with full, adequate and complete power of possession, management and control of all of said trust estate, real, personal or mixed and wheresoever situated.

(2) That said Hector M. Hitchings, upon turning over to said John Alden Lee and obtaining his receipt therefor of all of the afore-

said property, real, personal or mixed now in his possession, be and he is fully and completely acquitted, discharged and released from any and all accounting or accountings, debts, dues, demands or claims of any kind or nature whatsoever, in law or in equity, which we, or either of us, our, or either of our, heirs, executors, administrators or assigns may have against him by reason of the premises and for any act or thing heretofore done or performed by him.

(3) Any present action or proceeding now pending in the name of said Hector M. Hitchings to recover money or funds or property for the trust estate may and shall be continued in his own name as trustee, but at the expense and for the interest of the other parties hereto.

(4) Said Hector M. Hitchings hereby acquits and discharges each of the other parties hereto, their several heirs, executors, administrators and assigns of and from all debts, dues, demands or claims of any kind or nature he may have against them up to the present time, except for certain fees and charges as may accrue to him in the action of Hector M. Hitchings, as trustee, against Lehigh Valley Coal Company and in the action of Hector M. Hitchings, as trustee, against Walter Hiller, which said actions are the only actions now pending, outstanding and undetermined.

In witness whereof the parties hereto have hereunto set their respective hands and seals the day and year first aforesaid.

Hector M. Hitchings, Lewis C. Paine, William S. Paine, John Alden Lee.

In presence of: —— ——.

[fol. 48] City, County and State of New York, ss:

On this 29th day of March, 1921, before me came Hector M. Hitchings, John Alden Lee, Lewis C. Paine and William S. Paine to me known to be the individuals described in and who executed the foregoing instrument, and they severally acknowledged that they executed the same.

Susan V. Noble, Notary Public. New York County No. 52. N. Y. Reg. No. 2042. (Notary Seal.)

EXHIBIT 7 TO COMPLAINT

Report of Arbitrators

Wilkes-Barre, Pa., September 9th, 1913.

In re Arbitration by Engineers, representing the lessors and the lessee in a coal lease between Caroline M. Pettebone et al., lessors, and the Lehigh Valley Coal Company, dated December 15, 1888, under a clause in an agreement of settlement between the parties bearing date January 12, 1913.

To the Lehigh Valley Coal Company, lessee, and Kate P. Dickson and Maggie S. Paine, representing the lessors in the lease referred to:

The undersigned, John M. Humphreys, mining engineer for the Lehigh Valley Coal Company, lessee, and James H. Hughes, mining engineer, representing Kate P. Dickson and Maggie S. Paine, lessors in a lease dated December 15, 1888, between Caroline M. Pettebone et al., lessors, and the Lehigh Valley Coal Company, lessee, appointed by the respective parties under the provisions of the said agreement of settlement to examine and report as to the amount of coal unmined by the lessee in the leased premises, respectfully report:

First. That the royalty payments made by the lessee to the lessors, under the terms of the lease relating to minimum payments, in excess of the coal actually mined to November 30, 1912, amount to $40,930.32, said sum being inclusive of the sum of $15,500.00, paid under the said settlement agreement.

Second. That excluding from our consideration coal hereinafter referred to, there being some doubt as to whether the same is capable of being mined at the present time and under present conditions under the provisions of the lease, there now remains in the leased premises 145,170.11 tons of good merchantable coal capable of being mined of the value, at present prices based on the average rate received for the year 1912, viz: 31.476 cents per ton, upon which the royalties at the figures named in the lease would equal $45,693.88.

Third. That in our foregoing conclusion we have excluded from consideration:

(a) All the coal in the four foot, or upper vein, outside of line marked "safe workable limit," namely: seventy-five feet rock cover (see line on map); also 1,047 acres left for barrier pillar, as shown on map; and 48 per cent of the coal in the vein left for pillar support of the surface.

(b) 1.047 acres in the six foot vein left for barrier pillar, and 48 per cent of the coal in the same vein left for pillar support of the surface.

[fol. 49] (c) 1.047 acres of coal left for barrier pillar in the Marcy or eleven foot vein, and 40 per cent left in the same vein for pillar support of the surface.

(d) Excepting all veins underlying the Marcy or eleven foot vein, known as Splits of the Ross and Red Ash veins, on account of their apparently not being minable or capable of being mined under the terms of the lease from the data now available, namely: from records of bore holes only, there being no actual openings in these veins in the proximity of this property.

Fourth. Whenever the excepted portions are found capable of being mined, the provisions of the lease as to payment of royalties &c. shall again operate and be in force as to them.

(Signed) James H. Hughes, J. M. Humphreys.

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE BILL OF COMPLAINT

It is hereby stipulated and agreed that the bill of complaint dated June 8, 1923, in the prior action referred to in the orders in said action bearing date the 21st and 27th day of September, 1923, which said bill of complaint and orders are referred to in the order of the above court herein dated October 25, 1923, and which said bill of complaint is hereinafter referred to as the former bill of complaint, was and is identical in all respects with the complaint in equity herein dated October 1st, 1923, and filed in the office of the Clerk of this Court on the 3d day of October, 1923, which said complaint in equity is referred to in the said order of this Court herein dated October 25, 1923, and is hereinafter referred to as the latter complaint in equity, except in the following particulars:

1. The former bill of complaint was subscribed "Dated at New York, June 8th, 1923," whereas the latter complaint in equity is subscribed "Dated at New York, October 1st, 1923."

2. The former bill of complaint did not contain the words which are contained in the paragraphs of the latter complaint in equity as follows:

Paragraph Third: "and because to make her such party plaintiff would oust the court of jurisdiction."

[fol. 51] Paragraph Eleventh: "and to an equal, undivided one-half interest, as a tenant in common with this plaintiff in the lease rentals described in paragraph Eighth of this complaint and in Exhibit I hereto attached."

Paragraph Fourteenth: "and of the lease rentals thereof under said lease."

Paragraph "5" of the prayer for judgment: "and to have been in full and continuous force since January 21, 1913."

Dated, New York, November 9, 1923.

Hector M. Hitchings, Frank T. Wolcott, Solicitors for Plaintiff. Alexander & Green, Appearing Specially for Defendant Lehigh Valley Coal Company.

[fol. 52] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HECTOR M. HITCHINGS

Hector M. Hitchings being duly sworn, deposes and says:

He is an attorney and counsellor at law admitted for many years to practice in this Court and is one of the attorneys for the plaintiff herein.

That the complaint and subpœna herein were served by the United States Marshal/ for the Southern District of New York on F. H. Silvernail at the office of the defendant in New York City on October 5th, 1923 as appears by his return on the original.

That F. H. Silvernail is not only the Secretary of the defendant Lehigh Valley Coal Company as stated in Mr. Locke's affidavit, he is also the Treasurer and is the person designated by said Corporation to the Secretary of State of New York, as the representative of defendant upon whom process may be served. Deponent's information on this subject is derived from a letter written by deponent to the Secretary of State of New York on September 25, 1923 and a reply thereto from said Secretary of State under date of September 27th, reading:

[fol. 53] "State of New York,

Secretary of State's Office,

Albany

September 27, 1923.

M/C-580.

Hector M. Hitchings, Esq., 43 Cedar St., New York City.

DEAR SIR: This office is in receipt of your favor of the 25th inst. Lehigh Valley Coal Company, a Pennsylvania corporation, received authority to do business in this State October 4, 1895. F. H. Silvernail, 143 Liberty St., New York City, is the person designated for service of process in this State.

Respectfully yours, James A. Hamilton, Secretary of State."

This action is not brought by the plaintiff to construe the terms of a lease made in Wilkes-Barre, Pennsylvania, of coal lands in which plaintiff has a one-half interest. The construction of this lease has, as deponent understands it, been conclusively adjudicated by four different decisions of the Supreme Court of Pennsylvania, the court of last resort of that state, in favor of the lessor owners and against the defendant's contentions, and which decisions will be accepted as final by the United States Court. The action is brought:

1st. To determine the force and effect of an agreement of settlement of past due rentals and royalties made on January 30, 1913 by one George W. Glaze as the attorney in fact and the representative of the life tenant and remaindermen, owner of a one-half interest in said lease with the Lehigh Valley Coal Company, defendant in this action.

The plaintiff individually and as trustee represents all the present owners in fee of one half of said leased land of one half of the rentals and royalties stipulated for in said lease; Maggie S. Paine, the life tenant, for whose life the half interest was held in trust, having died, the old trusteeship had expired prior to the commencement of this action.

2nd. To determine the force and effect of an action brought by [fol. 54] Hector M. Hitchings, the last surviving trustee of said one-half interest, in the Supreme Court of the State of New York, and

3rd. For an accounting of rents due under the terms of said lease and a payment to this plaintiff of one half of such rents and royalties.

All the above issues will more fully appear by a critical inspection of the complaint in this action, copy of which is hereto attached and made a part hereof and to which complaint will be found attached, copies of the original lease, of the agreement of settlement by Glaze, of a report of arbitrators and of the pleadings in the Supreme Court Action in New York.

That the agreement of settlement, aforesaid, Exhibit 4 attached to the complaint herein, is made merely and solely between Maggie S. Paine, John Alden Lee, Majorie Lee, Lewis C. Paine and William S. Paine, per and pro George W. Glaze, their attorney in fact, parties of the first part and Lehigh Valley Coal Company and related solely and only to the said one half interest in said lease now represented by this plaintiff and in no wise related to the other one half interest represented by Kate P. Dixon.

That it is quite true as stated in the affidavit of Mr. Campbell Locke upon which this motion is based, that a previous application was made upon another and different complaint to dismiss said complaint for lack of jurisdiction and to set aside the service of a subpœna issued thereon.

That the service of said former complaint and of the subpœna issued thereon was made by one J. Elmer Melick, an employee of deponent and was not made by the United States Marshal/ for the dis-

trict nor by his deputy, nor was it made by some other person specially appointed by the Court or judge for that purpose and that, in consequence, it was rendered void and the Court deprived of jurisdic- [fol. 55] tion by Rule 15 of the Equity rules of the United States Courts.

The motion papers on said motion were served on a Friday afternoon returnable on Tuesday following with two intervening holidays and failed to point out any irregularities on which defendant's counsel relied and deponent interposed no answering affidavit, believing that the only point at issue was the one under Equity Rule 15, which, of course, deponent did not answer by affidavit, but on which he did interpose a short memorandum of law.

On September 12, 1923 Judge Manton handed down a memorandum decision, copy of which is hereto attached as Exhibit 1 and later signed the order, copy of which is attached as Exhibit 2.

Deponent did apply for a reargument and pointed out as stated in Mr. Locke's affidavit that the learned justice misapprehended, as I thought, both the facts and the law but this motion was denied.

Inasmuch as the subpœna and complaint had been, beyond question, improperly served and the Court had lost jurisdiction by reason thereof, deponent abandoned his first action and, after amending his complaint in essential particulars filed the same as a new complaint, obtained a new subpœna and had same properly served by the United States Marshall upon the person duly designated by the defendant for such service.

By examining the new complaint it will be found that the first complaint was all in print and that the new complaint has the written interlineations on the first printed complaint.

Deponent purposely drew the complaint in this action so that the facts being indisputable so far as deemed relevant by deponent and stated in the complaint, the question might be decided by the Court as a question of law on the pleadings, taken as an agreed statement of facts.

Kate P. Dixon, as stated in the Third paragraph of the complaint, is a resident of Wilkes-Barre, in the State of Pennsylvania and cannot be found in the State of New York and has not been served with [fol. 56] process and has not appeared herein and has declined to appear or to be represented as a party.

Hector M. Hitchings.

Sworn to before me this 23rd day of October, 1923. Mildred B. West, Notary Public, Kings Co., 103. Certificate filed in N. Y. Co. 314. (Seal.)

[fol. 57] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM OPINION—Filed September 13, 1923

It is pleaded in the complaint that Kate P. Dixon claims an interest in the lease in question. She is a resident of Pennsylvania, as is the defendant Lehigh Valley Coal Company. She is a necessary party. The reason she is not plaintiff is because she declined to become such and the plaintiff saw fit to make her a party defendant. If she were a party plaintiff, this Court would not have jurisdiction. Therefore, under the rule announced in Menefee v. Frost, 123 Fed. Rep. 633, the Court is without jurisdiction.

Motion granted.

Dated: September 12, 1923.

Manton, United States Judge.

[File endorsement omitted.]

[fol. 58] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby Stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated New York, November 9, 1923.

Hector M. Hitchings, Frank T. Wolcott, Attorney for Plaintiff Appellant, Alexander & Green, Appearing Specially for Defendant Lehigh Valley Coal Company.

[fol. 59] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 10th day of November in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the said United States the one hundred and forty-eighth.

Alex. Gilchrist, Jr., Clerk. (Seal of District Court of the Uinted States, Southern District of N. Y.)

Endorsed on cover: File No. 29,958. S. New York D. C. U. S. Term No. 222. John Alden Lee, individually and as trutsee of Lewis C. Paine, appellant, vs. Lehigh Valley Coal Company and Kate P. Dixon. Filed November 13th, 1923. File No. 29,958.

NOV 1 1924
WM. R. STA

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 222.

JOHN ALDEN LEE, individually and as trustee of LEWIS C. PAINE,

Plaintiff-Appellant,

v.

LEHIGH VALLEY COAL COMPANY, impleaded with KATE P. DIXON, not served or appearing,

Defendant-Respondent.

APPELLANT'S BRIEF.

HECTOR M. HITCHINGS,
FRANK WOLCOTT,
Attorneys for Plaintiff-Appellant,
111 Broadway,
New York City, N. Y.

ALEXANDER & GREEN,
Attorneys for Defendant-Respondent,
120 Broadway,
New York City, N. Y.

PRESS OF FREMONT PAYNE, INC., 80 Washington St., New York City.

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 222.

JOHN ALDEN LEE, individually and as trustee of LEWIS C. PAINE,
Plaintiff-Appellant,

against

LEHIGH VALLEY COAL COMPANY, impleaded with KATE P. DIXON, not served or appearing,
Defendant-Respondent.

APPELLANT'S BRIEF.

Statement.

There is but one question involved in this appeal, viz.: the question of jurisdiction of the U. S. District Court for the Southern District of New York, to hear and determine the issues presented by the complaint herein either with or without the inclusion of Kate P. Dixon as a party plaintiff or defendant.

A motion by order to show cause (p. 3, fol. 7) to dismiss the complaint for want of such jurisdiction was made by the defendant, Lehigh Valley Coal Company, a proper defendant and one over whom the court had complete jurisdiction (p. 48, fol. 52), and was granted by Hon. Learned Hand, Jr., upon the ground stated in the order, judgment and decree appealed from, viz.:

> "Ordered, adjudged and decreed that the motion to dismiss be and the same is granted and that the District Court

of the United States for the Southern District of New York is without jurisdiction to hear and determine this action on the ground of diversity of citizenship of the parties by reason of the fact that the defendant, Kate P. Dixon, a citizen and resident of Pennsylvania, is an indispensable and necessary party to this action and is so united in interest with the plaintiff herein that she must be aligned as a party plaintiff, and that the grounds alleged in the bill of complaint for making her a party defendant are not sufficient to vest this court with jurisdiction of the parties and cause of action" (p. 3, fol. 6).

Kate P. Dixon is shown to be a resident of Wilkes-Barre, Pennsylvania; that she had not been served with process; had not appeared herein and had declined to appear or to be represented as a party (p. 50 bottom).

The assignment of errors clearly presents the one point involved (p. 2, fol. 1).

The complaint states that Kate P. Dixon had been asked to join in the action as a party plaintiff but had refused, and because she was a proper party, had been made a party defendant (par. 26, p. 16).

The complaint is brought in equity because of certain mesne litigations, settlements, and agreements fully set forth therein, to recover large arrearages of royalties from the working, excavation and sale of coal and to recover for the rental of certain coal underlying 75 acres of land in Luzerne County, Pennsylvania, pursuant to the express terms and provisions of a 999 year lease of said coal, not of the land itself except for purposes of user, the said lease having been made on December 15, 1888, by the predecessors in title of plaintiff and Kate P. Dixon to the defendant, Lehigh Valley Coal Company and having been, since its making, in the full and complete use and occupation of the lessee.

Two clauses of the lease are, we think, of especial importance to the point under discussion, viz., the one on page 17 reading:

"Whereas the parties of the first part are seized in fee of all the coal in, under, and upon all that piece or parcel

of land situate in Wyoming Borough, in said County and State, bounded and described as follows."

And clause 15, page 22, reading:

"All and singular the grants, covenants, agreements and undertakings hereinbefore contained and made, or which are to be kept and performed by the parties of the first part, shall be binding upon each and every of them, their heirs, executors, administrators and assigns and inure to the benefit of the said party of the second part, their successors and assigns; and all and singular the grants, covenants, agreements and undertakings hereinbefore contained which are to be kept and performed by the said party of the second part, shall be binding on them, their successors and assigns and shall inure to the benefit of each and every of the said parties of the first part, their heirs, executors, administrators and assigns."

In clause Eleventh of the complaint, Kate P. Dixon's interest in this controversy, and in paragraphs Twelfth and Fourteenth, the plaintiff's interest, is stated in the following words:

"Eleventh: On information and belief that heretofore and before the termination of the trust above stated, Caroline M. Pettibone died in Luzerne County, Pennsylvania, and the defendant, Kate P. Dixon, succeeded to and became vested and now is vested, in fee, with all the interest of said Caroline M. Pettibone in said leased premises (fol. 21), that is to say of, in and to an undivided one-half interest therein and to an equal, undivided one-half interest, as a tenant in common with this plaintiff in the lease rental described in paragraph Eight of this complaint and in Exhibit 1, hereto attached.

Twelfth: On May 31, 1917, said Maggie S. Paine died in the City, County and State of New York, leaving her surviving as her sons and sole heirs at law and next of kin, John Alden Lee, William S. Paine and Lewis C. Paine,

all of full age, and leaving no other children and no children of any deceased child.

Fourteenth: By her last will and testament dated and published January 25, 1917, and duly admitted to probate by the Surrogates' Court of New York County on the 28th day of June, 1917, said Maggie S. Paine devised and bequeathed to her two sons, John Alden Lee and Lewis C. Paine, all the property and all the interest in the trust estate which she had so as aforesaid purchased and received by deed and assignment from her said son, William S. Paine, and thereupon and thereafter, said John Alden Lee, this plaintiff, and said Lewis C. Paine became, were and now are vested in fee simple absolute with the undivided one-half part of said premises, so as aforesaid leased to the defendant, Lehigh Valley Coal Company, and of the lease rentals thereof under said lease each being entitled to a one-quarter part or interest therein."

LEGAL ARGUMENT.

POINTS.

I.

The legal principles involved in this appeal have been so repeatedly before this court and the Circuit Court of Appeals that they are settled and established, the only difficulty being to apply them to the particular issues presented by each case.

1. *For the purposes of this motion, all facts properly stated in the complaint are conceded to be true and to be as stated.*

Montgomery's Fed. Procedure, 2nd Ed., Section 882, and cases cited thereunder.

2. *It is only where the complaint includes or excludes absolutely indispensable parties to a proper determination of the issues raised that the fatal inclusion or exclusion of same deprives the court of jurisdiction to hear and determine the issues and that the complaint can be dismissed.*

> Salem Trust Co. v. Mffrs. Finance Co., Adv. Sheets No. 10, March 15, 1924, page 270, decided by this court, Feb. 18, 1924.

In the course of the opinion in the Salem Trust Co. case, Mr. Justice Butler wrote:

> "On the question of jurisdiction, an unnecessary and dispensable party will not be considered." Citing cases.

In determining the question of jurisdiction in this particular case, there are several questions necessary to be considered, viz.:

(a) Could the question of jurisdiction, because of Kate Dixon, be raised by the Lehigh Valley Coal Co. a proper and indispensable party already and indisputably within the jurisdiction of the court below, for, unless Kate Dixon was an "indispensable" party, it is well settled, as we understand it, that it could not be so raised, the objection being purely a personal one to Kate Dixon.

> Smith v. Atchison T. & S. F. R. Co., 64 Fed., 1, 2, 3; Camp v. Gress, 250 U. S., 308, 316.

(b) Does not Section 1032 of the U. S. Compiled Statutes, West Ed., page 1109 (Jud. Code, §50), eliminate and answer the objection?

That section provides:

> "When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may

> entertain jurisdiction, and may proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

The above provision of the Compiled Statutes is repeated in Section 50 of the Judicial Code.

An appearance by Kate Dixon in this action and an answer by her would have waived the question of jurisdiction on her part and enabled the court to proceed.

Above statute: Jones v. Andrews, 10 Wall., 327.

(c) Kate P. Dixon, while a proper and wholly suitable party for a complete determination of the issues raised and a full accounting and release of the defendant, Lehigh Valley Coal Company, from liability was not an "indispensable" party.

In our statement, supra, we called attention to paragraph 15 of the lease agreement sued upon which provides that

> "all and singular the grants, covenants, agreements and undertakings hereinbefore contained which are to be kept and performed by the said party of the second part shall be binding on them, their successors and assigns and shall inure to the benefit of *each and every* of the said parties of the first part, their heirs, executors, administrators, and assigns."

Plaintiff and Kate Dixon are tenants in common each of an undivided one-half of the fee of the 75 acres of land and of the coal underlying the surface which is leased to the Lehigh Valley Coal Company.

The Lehigh Valley Coal Company is completely bound by the allegations of the complaint.

By the specific terms of the lease, each fee owner is entitled to an equal one-half of the lease rental called for thereby, and

this ownership carries with it, naturally and necessarily, a personal cause of action in each to recover his or her aliquot share of the same.

In Elmendorf v. Taylor, 10 Wheat., page 152 (6 Law Ed., 289), the exact question now at issue came before this court and Mr. Chief Justice Marshall, at page 166, wrote:

> "2. It is contended that he is a tenant in common with others, and ought not to be permitted to sue in equity without making his co-tenants parties to the suit.
>
> This objection does not affect the jurisdiction, but addresses itself to the policy of the court. Courts of Equity require that all the parties concerned in interest shall be brought before them that the matter in controversy may be finally settled. This equitable rule, however, is framed by the court itself and is subject to its discretion. It is not like the description of parties an inflexible rule, a failure to observe which turns the party out of court, because it has no jurisdiction over his cause; but, being introduced by the court itself, for the purpose of justice, is susceptible of modification for the promotion of those purposes."

Judge Sanborn, writing for the Circuit Court of Appeals, Eighth Circuit, in O'Neill v. Wolcott Mining Co., 174 Fed., 527, at page 536, stated the settled rule in the following language:

> "An indispensable party is one who has such an interest in the subject-matter of a controversy that a final decree between the parties before the court cannot be made without injuriously affecting his interest or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Every other party who has any interest in the controversy or the subject-matter which is separable from the interest of the parties before the court, so that it will not be immediately affected by a decree between them, is a proper party." (Citing cases.)

The rule that a tenant in common may sue without joining

his co-tenants as parties plaintiff has long been a settled and well established rule of law.

> Cruger v. McLaury, 41 N. Y., 219, 222, 223, and cases cited in opinion;
> Stephen v. Beall, 22 Wall., 329.

In Whittle v. Actis, 55 Fed., 919, Judge Sage wrote for the court:

> "A tenant in common recovers only his aliquot part or share, Mobley v. Bruns, 59 Pa. State, 481; Minke v. McNamee, 30 Md., 294; Jones v. Walker, 47 Ala., 175. Two or more tenants in common may sue in ejectment, or any one may sue alone for his share. Tilden v. Tilden, 13 Gray, 108; Bush v. Bradley, 4 Day, 303; Penrod v. Danner, 19 Ohio, 218; Shepherd v. Ryers, 15 John, 501."

Respondent succeeded in the court below by virtue of Equity Rule 37, reading:

> "All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs * * * any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants but when anyone refuses to join, he may for such reason be made a defendant."

Chief Justice Marshall disposed of this contention in the Elemendorf case, *supra*.

They further relied upon the decision of Judge Lacomb in Menefee v. Frost, 123 Fed., 633, which case is readily distinguishable from the case at bar, and if it were not, must yield to the accumulated weight of authority against the holding.

The position assumed by the defendant in this action would be quite inexplicable to plaintiff's attorney from a purely business standpoint were it not for the fact that for eight years,

viz.: from 1905 to 1913, the Lehigh Valley Coal Company never paid a dollar of rental under this 999 year lease, and, in 1913, when it was brought to book by Glaze (see Ex. 4, p. 28) was able to settle the accrued rents for fifty cents on the dollar, and, since 1913, another period of nearly eleven years, it has never paid a dollar of rental although at all times in complete possession of the demised premises to the exclusion of plaintiff or anyone else, and it doubtless expects to continue another ten years without the payment of another dollar if it can prolong this litigation for that length of time.

II.

For the reasons stated, it is respectfully submitted that the order and decree appealed from should be reversed, with costs and the cause remitted to the District Court to proceed with the same in due course.

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FILED
JAN 21 1925
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1924.

No. 222.

JOHN ALDEN LEE, INDIVIDUALLY AND AS TRUSTEE OF LEWIS C. PAINE,

Appellant,

against

LEHIGH VALLEY COAL COMPANY, IMPLEADED WITH KATE P. DIXON,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE LEHIGH VALLEY COAL COMPANY.

ALLAN McCULLOH,
CHARLES W. PIERSON,
CAMPBELL LOCKE,
Of Counsel for Appellee.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1924.

No. 222.

JOHN ALDEN LEE, individually and as Trustee of Lewis C. Paine,
Appellant,

AGAINST

LEHIGH VALLEY COAL COMPANY, impleaded with KATE P. DIXON,
Appellee.

BRIEF FOR APPELLEE LEHIGH VALLEY COAL COMPANY.

This is an appeal (p. 1) under Section 238 of the Judicial Code from the District Court of the United States for the Southern District of New York and brings up for review a determination by that Court (pp. 2, 3) that the Court was without jurisdiction for the reason that the defendant Kate P. Dixon, a citizen of Pennsylvania, was a necessary and indispensable party and should be aligned as party complainant, and, upon such alignment, the requisite diversity of citizenship did not exist as the defendant Lehigh Valley Coal Company, the appellee herein, was also a citizen of Pennsylvania.

POINT I.

The defendant Kate P. Dixon should properly be aligned as a party complainant.

All parties necessary to the adjudication of the rights of the parties on the one side or the other, having the same rights and interests, must be citizens of different states from those on the other side, no matter whether they are, on the face of the pleading, stated as plaintiffs, or complainants, or defendants. The court will, in determining the question of jurisdiction, place the parties on the one side or the other, according to their respective interest in the subject-matter of litigation.

Removal Cases, 100 U. S. 457, 469.

The bill of complaint alleges that the complainant John Alden Lee is trustee for himself and his brother Lewis C. Paine (p. 14) of an undivided one-half of certain premises situated in Luzerne County, Pennsylvania, described in a coal mining lease made by the predecessors in interest of the complainant and the defendant Kate P. Dixon to the defendant appellee Lehigh Valley Coal Company, and of the rental thereunder (pp. 10-12), and that the defendant Kate P. Dixon is vested in fee with the other undivided one-half interest in said premises and with an equal undivided one-half interest as a tenant in common with the complainant in the rental under said lease (p. 11); that during 1905 and until January 31, 1913, the defendant appellee Lehigh Valley Coal Company neglected and refused to pay the rent or royalty reserved

under said lease (p. 12); that, pursuant to an agreement dated January 21, 1913, executed by the attorney in fact for the complainant John Alden Lee, the said Lewis C. Paine and others interested in the said undivided one-half interest under said lease and the defendant appellee Lehigh Valley Coal Company, the latter paid to said attorney in fact a sum equal to fifty per cent. of the minimum rental due since March, 1905, with interest in full of their share of the minimum rental up to the date of said agreement (p. 13); and after alleging certain acts claimed to constitute breaches of said agreement (pp. 15, 16), demands judgment, among other things (p. 16):

(1) that the true meaning and effect of said lease may be judicially determined in accordance with the law of Pennsylvania;

(2) that the true force and effect of said agreement of January 21, 1913, may be judicially determined;

(3) that it be judicially determined that a certain portion of said agrement of January 21, 1913, is wholly without consideration, a fraud upon the complainant and the defendant Kate P. Dixon, and illegal, unlawful, and void;

(4) that the defendant appellee, Lehigh Valley Coal Company, be compelled to account to the complainant and to the defendant Kate P. Dixon, pursuant to the terms and requirements of said lease, for each and every ton of coal mined and sold by it since January 21, 1913, or, in the alternative, for the minimum royalties since said date, and to pay over to the complainant one-half of the amount found due; and

(5) that said lease be declared to be in full force and effect as to all its terms and provisions, and to have been in full and continuous force since January 21, 1913.

The bill of complaint (p. 9) alleges that the complainant is a citizen of the United States and a citizen of and resides in the State of New York; that the defendant appellee Lehigh Valley Coal Company is a citizen of the United States and of the State of Pennsylvania but has complied with Sections 15 and 16 of the General Corporation Law of the State of New York, and has obtained from the Secretary of State of that State a certificate entitling it to do business therein and has and has had a place of business and is and has been conducting business therein; and

> "That the defendant, Kate P. Dixon is a citizen of the United States and of the State of Pennsylvania and resides at 75 North River Street, City of Wilkes-Barre, in the State of Pennsylvania, and is a proper party plaintiff to this action but has been made a party defendant because of her expressed unwillingness and refusal to be made a party plaintiff, and because to make her such party plaintiff would oust the Court of jurisdiction" (p. 9); and

> "That before the commencement of this action plaintiff demanded of the defendant Kate P. Dixon, that she become a party plaintiff to this action and that she declined and refused so to do and she is, in consequence, made a party defendant hereto" (p. 16);

and that

> "The grounds upon which the Court's jurisdiction depends is that the amount involved in this cause is over $3,000. exclusive of interest

> and costs and there is diversity of citizenship between plaintiff and all the defendants" (p. 10).

After service on October 5, 1923 (p. 5), of the subpœna and bill of complaint on its Secretary in the City of New York, the defendant appellee Lehigh Valley Coal Company, appearing specially for that purpose, made an application (pp. 3-6) for the setting aside of the service and the dismissal of the bill of complaint on the ground that it appeared from the bill of complaint that the District Court was without jurisdiction. By an order of the District Court entered October 25, 1923 (pp. 2-3), it was adjudged that upon a proper alignment of the defendant Kate P. Dixon as a party complainant the requisite diversity of citizenship did not exist in the suit to confer jurisdiction on the Court upon that ground, and the application to dismiss the bill of complaint was granted, and the complainant takes the present appeal (p. 1).

The allegations of the bill of complaint thus disclose and the complainant admits (p. 9) that upon a proper arrangement of the parties the defendant Kate P. Dixon should be aligned on the side of the complainant. No controversy is alleged between her and the complainant.

POINT II.

The defendant Kate P. Dixon is an indispensable party.

The nature of the suit as disclosed upon the face of the bill of complaint and the prayer for judgment show clearly that the interest of the defendant Kate P. Dixon is such that a final decree cannot be made without her presence as a party without the possibility of injuriously affecting her rights or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. In her absence the true meaning and effect of the lease cannot be determined (p. 16) nor can it be declared to be in full force and effect or to have been in full and continuous force since January 21, 1913 (p. 17), so as to be binding on her, and its construction, if determined in a suit in which she was not joined, might be differently determined in another suit initiated by her or to which she was a party. The defendant appellee Lehigh Valley Coal Company should not be subjected to the possible hazard of contradictory determinations in separate litigations. Without Kate P. Dixon as a party it cannot be effectually judicially determined that a portion of the agreement of January 21, 1913, was a fraud upon her as demanded (p. 16), nor can the defendant appellee Lehigh Valley Coal Company be compelled to account to her (p. 16) unless she be joined in the suit.

POINT III.

The defendant Kate P. Dixon being an indispensable party and properly alignable as a complainant and being a citizen of the same State as the defendant appellee Lehigh Valley Coal Company, the District Court had no jurisdiction as the requisite diversity of citizenship did not exist.

The appellant invokes the provisions of Section 50 of the Judicial Code which permits the Court to proceed in certain cases without the presence of absent parties. It is well settled that this rule does not affect the principle that a suit cannot be entertained in the absence of an indispensable party.

Barney v. *Baltimore,* 6 Wall. 280.

It may well be that in a case originally brought in the District Court, as distinguished from a case removed thereto, the presence of a party, even although not indispensable, will defeat the jurisdiction if his presence destroys the requisite diversity of citizenship. The complainant has selected his forum and named the parties to the suit and he must abide the effect of his voluntary acts. The case of *Salem Trust Company* v. *Manufacturers' Finance Company, et al.,* 264 U. S. 182, cited by the appellant, was a removed case and not one originally instituted in the District Court.

The allegations that Kate P. Dixon was made a party defendant because of her expressed unwilling-

ness and refusal to be made a party complainant though so requested, and that to make her a complainant would oust the Court of jurisdiction (pp. 9, 16), cannot avail the complainant.

> "When it is obvious that a party who is really on complainant's side has been made a defendant for jurisdictional reasons, and for the purpose of reopening in the United States courts a controversy already decided in the state courts, the court will look beyond the pleadings and arrange the parties according to their actual sides in the dispute." (Quoted from head note.)
>
> *Dawson* v. *Columbia Trust Company*, 197 U. S. 178.

POINT IV.

The question of jurisdiction was determined adversely to the complainant in a preceding suit.

Prior to the present suit the appellant attempted to institute a like suit in the same District Court, upon a bill of complaint substantially similar (pp. 47, 48), naming the same parties as defendants, and, on application of the defendant appellee Lehigh Valley Coal Company, the bill of complaint was dismissed therein on the ground that it appeared on the face thereof that the Court did not have jurisdiction (p. 6). The Court in its opinion (fol. 51) rendered in the prior suit referred to a previous decision in that District in which, in a suit for an accounting upon a written contract brought by citizens of Texas and Illinois against the other parties to the contract

who were citizens of New York, it was held that another citizen of New York, who had been joined as defendant but who was a party to the same side of the contract as the complainants, should be aligned as complainant, and that jurisdiction was thereby defeated.

Menefee v. *Frost,* 123 Fed. 633.

POINT V.

The action of the District Court in dismissing the bill of complaint should be affirmed.

ALLAN McCULLOH,
CHARLES W. PIERSON,
CAMPBELL LOCKE,
Of Counsel for Appellee.

N2430

LEE, INDIVIDUALLY AND AS TRUSTEE OF LEWIS C. PAINE *v.* LEHIGH VALLEY COAL COMPANY & KATE P. DIXON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 222. Argued January 22, 1925.—Decided April 13, 1925.

In a suit by one of two lessors against the lessee to construe and establish the lease and obtain accounting for both lessors, charging fraud by lessee, the other lessor is a necessary, if not an indispensable, party, and, for the purpose of determining original jurisdiction of the District Court through diversity of citizenship, must be aligned with the plaintiff. P. 543.

Affirmed.

APPEAL from a decree of the District Court dismissing a bill for want of jurisdiction.

Mr. H. M. Hitchings and *Mr. Frank Wolcott*, for appellant, submitted.

Mr. Charles W. Pierson, with whom *Mr. Allan McCulloh* and *Mr. Campbell Locke*, were on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill brought against the Lehigh Valley Coal Company, lessee of a coal mine, by John Alden Lee, who owns one-half of the mine in his own right and as trustee for his brother. Kate P. Dixon owns the other half. The bill seeks a construction of the lease and of an agreement made on behalf of the plaintiff's interest on January 21, 1913; a declaration that certain parts of the agreement are a fraud upon the plaintiff and Kate P. Dixon; an account to the plaintiff and Kate P. Dixon from the Coal Company, and that the lease may be declared to be, and to have been since January 21, 1913, in

full force and effect. The Coal Company is a corporation of Pennsylvania, the plaintiff Lee a citizen and resident of New York, and Kate P. Dixon is a citizen and resident of Pennsylvania. She is made a defendant, the bill alleges, because of her refusal to be made a plaintiff 'and because to make her such party plaintiff would oust the Court of jurisdiction.' The bill was dismissed for want of jurisdiction by the District Court, we presume on the ground that, so far as appeared, the arrangement of the parties was merely a contrivance for the purpose of founding a jurisdiction that otherwise would not exist. *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 181.

The plaintiff and appellant now argues that Kate P. Dixon is not a necessary party. When a defendant seeks to remove a suit from a State Court to the District Court, of course he is entitled to contend that a party joined by the plaintiff is not a necessary party and therefore does not make the removal impossible by defeating the jurisdiction. *Salem Trust Co.* v. *Manufacturers' Finance Co.*, 264 U. S. 182. It is a different question whether the plaintiff can repudiate the effect of his own joinder, can retain a party to the relief sought and yet keep him on the wrong side in order to avoid the effect of his own act. Without inquiring whether the plaintiff could have maintained the suit alone had he so elected and had he found it impossible to join Kate P. Dixon, obviously she was a 'necessary' even if not an indispensable party. (*Shields* v. *Barrow*, 17 How. 130, 139.) It would be hard upon the Coal Company to compel it to submit to an adjudication upon the lease, upon a fraud alleged to have been committed against both owners, and to an account, in the absence of one of the lessors. The joinder of both is much more than a mere form. As both are named they must be arranged upon the side on which they belong. *Menefee* v. *Frost*, 123 Fed. 633. *Blacklock* v. *Small*, 127 U. S. 96.

Decree affirmed.